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# THE THREE AGES OF MODERN AMERICAN LAWYERING AND THE CURRENT CRISIS IN THE LEGAL PROFESSION AND LEGAL EDUCATION

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# THE THREE AGES OF MODERN AMERICAN LAWYERING AND THE CURRENT CRISIS IN THE LEGAL PROFESSION AND LEGAL EDUCATION

**Rachel F. Moran\***

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#### INTRODUCTION

During the first months of 2018, two short pieces on legal education were published. One reported on the results of a survey of college graduates, law school graduates, and holders of other advanced degrees.<sup>1</sup> The study found that today's post-law graduates were less likely than their pre-recession counterparts to report that the J.D. degree was worth the cost and more likely to have second thoughts about their decision to go to law school.<sup>2</sup> The findings prompted Aaron Taylor, executive director of the Access Lex Center for Legal Education Excellence, to conclude that there are "two distinct worlds of law graduates" made up of "[t]he ones who graduated during and after the recession [that began in 2008]. Those in the former group paid less for their degrees and they had an easier time finding good employment. The latter group paid more and had a harder time finding good employment."<sup>3</sup>

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1. See Karen Sloan, *Law Grads Have Grown Skeptical of a JD's Value*, LAW.COM (Jan. 17, 2018, 2:21 PM), <https://www.law.com/sites/almstaff/2018/01/16/law-grads-have-grown-skeptical-of-a-jds-value/>.

2. *Id.* at 2.

3. *Id.*

The second piece was an open letter to Harvard law students from alumnus Ralph Nader.<sup>4</sup> In his letter, Nader decried his alma mater's failure to recognize the obligations of public service that come with being part of a learned profession.<sup>5</sup> He urged students to become aware of "the distinction between charity and justice."<sup>6</sup> As he explained, "charitable work by lawyers is about immediate assistance, while advancing justice is structural work that foresees and forestalls the conditions that give rise to the ever-growing need for charity."<sup>7</sup> He exhorted students not to "trivialize your estimable talents for lucrative returns" because "[k]eeping your conscience at home while selling your talents is a very high price to pay during the fifty years or so you will practice law."<sup>8</sup> He recommended that students be broadly curious and "passionately attach [themselves] to some mission for more *structural* justice."<sup>9</sup>

A reader unfamiliar with the field of law could not be faulted for wondering whether these two pieces, published almost contemporaneously, are referring to the same profession. While one emphasizes whether a career in law is a satisfactory financial proposition, the other focuses on the duties of lawyers to advance the greater good. This Article asks how such utterly distinct images of the legal profession and legal education have come to exist side by side and how this ongoing juxtaposition poses special challenges for law and leadership. These parallel accounts of professionalism have deep roots in the historical evolution of modern American lawyering. The organized bar has embraced a model of "social trustee professionalism,"<sup>10</sup> which treats law as a learned profession with public-regarding obligations. As social trustees, attorneys are to use their

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4. See Ralph Nader, *An Open Letter to Harvard Law Students*, THE HARVARD LAW RECORD (Feb. 12, 2018), <http://hlrecord.org/2018/02/an-open-letter-to-harvard-law-students/>.

5. See *id.*

6. *Id.* at 2.

7. *Id.*

8. *Id.* at 3.

9. *Id.* at 4 (emphasis in original).

10. STEVEN BRINT, IN AN AGE OF EXPERTS 36 (1994). In scholarship on legal ethics, social trustee professionalism maps onto a "public interest" model of professional responsibility in which an attorney owes duties to the court and to innocent third parties as well as to clients. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 8 (1998). For a skeptical view of this model and the ethical norms it establishes, see Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 653, 668 (1981) (social trusteeship is more rhetorical than real and primarily serves to legitimate the profession's market control) [hereinafter Abel, *Why Does the ABA Promulgate Ethical Rules?*]; Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1397, 1400-09, 1447 (2003) (questioning whether morally activist, civic republican lawyering ever enjoyed a dominant place in the American legal profession).

complex knowledge and skills to serve both individual clients and the greater good.<sup>11</sup> Attorneys become “double agents”<sup>12</sup> in ways that potentially pit the private and self-regarding interests of clients against a more selfless and public-regarding concern for collective welfare. The precise parameters of that trade-off have never been entirely clear. At times, the greater good has been equated with protecting the justice system by upholding norms of formal neutrality and impartiality and rejecting a “win-at-all-costs” mentality.<sup>13</sup> Yet, regard for the public welfare can have broader implications: Lawyers may aspire to advance social justice in ways that blur the line between law and politics.<sup>14</sup> Striking the right balance between private interests and public values has undoubtedly been difficult—if not impossible—to achieve. Given these difficulties, some attorneys have turned away from social trusteeship altogether to embrace expert professionalism, which defines a mastery of knowledge and skills as the sole basis for status and respect.<sup>15</sup> This market-based approach treats expertise as a private commodity to be bought and sold. Far from being a double agent, then, a lawyer’s only obligation is to advance a client’s objectives—at a price.<sup>16</sup>

To understand the ongoing and unresolved status of these competing concepts of professionalism, it is useful to trace how lawyers’ identities evolved during three prior ages of modern American lawyering. The first age emerged in response to industrialization and urbanization during the late nineteenth and early twentieth century. With the rise of large corporations, a new breed of lawyer emerged to serve the business community, most notably in the urban centers of New York and Chicago. To temper an image of attorneys as nothing but the tools of wealthy industrial clients, corporate lawyers assumed leading roles in

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11. BRINT, *supra* note 10, at 36-37; RICHARD L. ABEL, AMERICAN LAWYERS 16 (1989) [hereinafter ABEL, AMERICAN LAWYERS].

12. Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS 53 (Gerard W. Gawalt ed., 1984). See also Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 955 (2000) (“The dual role of [safeguarding the justice system and distributing goods through private commercial markets] causes internal conflict in the profession.”).

13. WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 2-4, 67-68, 81-82 (2d ed. 2005).

14. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 490-92 (1985) [hereinafter Abel, *Law Without Politics*].

15. BRINT, *supra* note 10, at 8-9. In legal ethics scholarship, expert professionalism maps onto an “agency loyalty” model in which the lawyer’s sole duty is one of fidelity to the client’s interests. The lawyer must refrain from evaluating the legitimacy or wisdom (as opposed to legality) of their desire. SIMON, *supra* note 10, at 7; Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

16. BRINT, *supra* note 10, at 40-41.

the organized bar and embraced social trustee professionalism to highlight their public-spiritedness. Social trusteeship was used to justify new ethical constraints on commercial practices like advertising and “ambulance chasing” that might confuse law practice with a profit-seeking trade.<sup>17</sup> At the same time, bar leaders pushed for high standards of admission to practice to make clear that law was an intellectual enterprise distinct from both the world of business and the rough-and-tumble of politics. As a result, law schools played a pivotal part in elaborating social trustee professionalism, even as they began to emphasize the knowledge and skills at the core of expert professionalism.<sup>18</sup>

The second age of modern American lawyering accompanied the rise of the New Deal. The nation’s economic collapse during the Great Depression left many Americans impoverished and doubtful that the free market would protect ordinary people against the depredations of capitalism.<sup>19</sup> With courts perceived as obstructing reform on formalist grounds, New Deal attorneys invoked the power of the political branches to deploy law in the service of the general good. The upshot was the rise of government lawyers, who specialized in administrative law and regulatory practice. In implementing New Deal reforms, these lawyers challenged the prerogatives of the corporate bar and ultimately created their own power base.<sup>20</sup> Despite the profound shift in lawyering, bar leaders did not make far-reaching changes to standards of professional conduct in response to this emerging form of practice.<sup>21</sup> Nor did law schools alter their curricula in fundamental ways to prepare students for new responsibilities. Faced with a normative void, government lawyers justified their newfound authority on grounds of expertise, much as economists or other technical experts in the New Deal’s brain trust did. This sharp turn to expert professionalism contradicted the tradition of social trusteeship, but any nascent conflict was deflected by treating government lawyers as inherently public-minded because they served an amorphous client known as “the people.”<sup>22</sup>

The third age of modern American lawyering came about during the campaign to promote civil rights, initially for blacks and later for

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17. JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 42-43 (1976).

18. See *infra* notes 75-81.

19. See RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY* 162-63 (1995).

20. See *infra* notes 162-66 and accompanying text.

21. Abel, *Why Does the ABA Promulgate Ethical Rules?*, *supra* note 10, at 644 (ethical rules do not address “the distinctive situation of the lawyer employed by business or government”).

22. See *infra* notes 170-77 and accompanying text.

other marginalized groups.<sup>23</sup> The success of the civil rights movement led to the rise of cause lawyering,<sup>24</sup> which cast attorneys' obligation to promote the general welfare in a fresh light. Cause lawyers moved well beyond protecting the integrity of the legal and judicial process by emphasizing structural reforms that required political intervention.<sup>25</sup> But, in contrast to government lawyers, these attorneys did so as outsiders who challenged conventional uses of power and authority. Even as cause lawyers tested the boundaries of social trustee professionalism, they rejected the narrowness of expert professionalism.<sup>26</sup> In their view, lawyers were not mere instruments of clients' desires but instead had to work collaboratively with clients and communities to identify and implement reform.<sup>27</sup> Ironically, though, cause lawyering sowed the seeds of an intensified commitment to market-based expert professionalism. Cause lawyers successfully challenged ethical prohibitions on advertising and solicitation, which in turn unleashed newfound competitiveness for clients and revenues among attorneys.<sup>28</sup> Cause lawyering raised profound questions about professionalism, but the organized bar and legal educators left most of these questions unanswered, further complicating the uneasy relationship between social trustee and expert professionalism.

Understanding the three ages of modern American lawyering can help us to contemplate whether there is currently a crisis in the legal profession and legal education, whether that crisis is leading us to a fourth age of lawyering, and how best to approach this momentous

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23. See RICHARD KLUGER, *SIMPLE JUSTICE* 117-37 (1977) for the early origins of this movement.

24. The term "cause lawyering" is itself a subject of debate and vies with other terms like "social justice lawyering," "public interest lawyering," "rebellious lawyering," and "lawyering for social change." Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING* 31, 33 (Austin Sarat & Stuart Scheingold eds. 1998).

25. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in *CAUSE LAWYERING* 4 (Austin Sarat & Stuart Scheingold eds. 1998) [hereinafter Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*].

26. Stuart Scheingold, *The Struggle to Politicize Legal Practice*, in *CAUSE LAWYERING* 128 (Austin Sarat & Stuart Scheingold eds. 1998).

27. Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *supra* note 25, at 3-4; DAVID LUBAN, *LAWYERS AND JUSTICE* xxv (1988); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300, 302-04 (1996).

28. See, e.g., JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS* 71-75, 79-88 (2013); see STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE* IN 9, 23-24 (2004) [hereinafter SARAT & SCHEINGOLD, *SOMETHING TO BELIEVE* IN]; Scott Cummings, *The Politics of Pro Bono*, 42 UCLA L. REV. 1, 13-15 (2004); Sarat & Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *supra* note 25, at 3-4; John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *CAUSE LAWYERING*, *supra* note 24, at 181, 183-86.

question. Much of the current sense of crisis stems from the restructuring of the market for expertise.<sup>29</sup> These changes lie behind Aaron Taylor's conclusion that pre- and post-recession law graduates inhabit different worlds. Some commentators have gone even farther. For them, market restructuring seems so profound that it calls into question the ongoing relevance of professionalism, a shift that would surely augur a marked departure from earlier ages of modern American lawyering.<sup>30</sup> Market restructuring also has posed new questions about whether social trustee professionalism will be displaced in the rush for revenue, often with a focus on large law firm attorneys, as Ralph Nader's open letter makes clear.<sup>31</sup> This growing emphasis on the bottom line has left many law students and lawyers, even public interest lawyers, wondering whether a dedication to the greater good is a personal rather than professional commitment.<sup>32</sup> The notion that being a lawyer is divorced from any larger social obligations again would represent a notable shift from earlier ages of American lawyering.

To address these challenges, bar leaders and legal educators must carefully evaluate how market forces are reshaping expert professionalism to determine whether social trustee professionalism eventually will be crowded out or whether professionalism itself will cease to be a useful tool for understanding lawyers' identities. That assessment will need to take place not just in large law firms but in solo practices, small and mid-sized firms, public interest organizations, and government agencies. Efforts to study professionalism should go beyond an analysis of technical knowledge to identify a broad portfolio of skills that predict success in law practice. Moreover, there should be a recognition that the meaning of social trusteeship can differ across practice sectors, especially when comparing law firms to government agencies and public interest organizations. Ideally, these inquiries will offer a more nuanced picture of the ways in which lawyers understand

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29. For descriptions of the current sense of crisis, see, e.g., BENJAMIN BARTON, *GLASS HALF FULL* 55-103, 121-29 (2015); BRIAN Z. TAMANAH, *FAILING LAW SCHOOLS* 71-84, 107-66 (2012). But cf. Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 *STAN. L. & POL'Y REV.* 503, 504-05, 506-09 (2013) (a sense of crisis is a recurring feature of the legal profession and legal education); Richard L. Abel, "You Never Want a Serious Crisis to Go to Waste." *Reflections on the Reform of Legal Education in the U.S., UK, and Australia*, 22 *INT'L J. LEGAL PROF.* 3, 3-4, 5, 16 (2015) [hereinafter Abel, *You Never Want a Serious Crisis to Go to Waste*].

30. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 71-128 (2010); Russell Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 *N.Y.U. L. REV.* 1229, 1246-69 (1995).

31. See, e.g., William D. Henderson & Marc Galanter, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867, 1906-1913 (2008).

32. See John Bliss, *Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis*, 42 *LAW & SOC. INQUIRY* 855, 890 (2017).



their work and allow law schools to prepare students to navigate their own careers effectively.

I. THE FIRST AGE OF MODERN AMERICAN LAWYERING: THE RISE OF  
CORPORATE LAW AND THE EMERGENCE OF THE UNIVERSITY LAW  
SCHOOL

Before turning to the first age of modern American lawyering, it is worth observing that law's status as a profession is of ancient vintage. Law, along with medicine and theology, was one of three original professions that emerged in England in the late medieval period.<sup>33</sup> Professionals catered to the needs of the landed gentry: Doctors would attend to the mortal flesh, lawyers to the material wealth, and ministers to the eternal soul of the most privileged members of society.<sup>34</sup> The success of this arrangement turned on the trust that professionals engendered by acquiring the gentlemanly characteristics of their clients.<sup>35</sup> The elite nature of the legal profession was exported to the American colonies, where a system of apprenticeships preserved exclusivity through closed social networks.<sup>36</sup> During the early years of the republic, the typical lawyer practiced alone or in a small firm and often held other jobs simultaneously.<sup>37</sup> With law in a fairly rudimentary state, technical expertise at times was secondary to "forensic bravura" in cementing a lawyer's reputation.<sup>38</sup>

Like their English counterparts, American lawyers served an elite clientele but distinguished themselves by using these intimate associations to assume a leading role in the nation-building process—so much so that in the 1830s, Alexander de Tocqueville dubbed attorneys America's aristocracy.<sup>39</sup> The gentleman-lawyer's conspicuously advantaged status ultimately triggered a populist backlash that lasted from the late 1820s through the early 1850s. Reacting to fears that the legal profession was indifferent to the common people, Jacksonian democrats eliminated barriers to law practice as a way to diminish

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33. BRINT, *supra* note 10, at 26-27; Robin Middlehurst & Tom Kennie, *Leading Professionals: Toward New Concepts of Professionalism*, in *THE END OF THE PROFESSIONS?* 50-51 (Jane Broadbent et al. eds. 1997).

34. BRINT, *supra* note 10, at 27.

35. *Id.* at 27-28; Jane Broadbent, Michael Dietrich, and Jennifer Roberts, *The End of the Professions?*, in *THE END OF THE PROFESSIONS?*, *supra* note 33, at 3.

36. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* 10-13 (1977); BRINT, *supra* note 10, at 8.

37. BARTON, *supra* note 29, at 20-21; ANTON-HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 27-28 (1965).

38. LARSON, *supra* note 36, at 125-26; CHROUST, *supra* note 37, at 27.

39. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 281-90 (1945); LARSON, *supra* note 36, at 111, 168-69.

practitioners' perceived privilege. These changes did little to unsettle the prerogatives of gentlemen-lawyers but devastated the fledgling bar.<sup>40</sup>

During the late 1800s and early 1900s, the rise of industrialization and urbanization coincided with concentrated wealth; indeed, this era was dubbed the Gilded Age.<sup>41</sup> With economic restructuring, a new kind of client emerged: the large American corporation. Corporate clients sought advice on novel and complex business questions, and leading lawyers formed firms in the urban centers of New York and Chicago to accommodate these demands.<sup>42</sup> Due to the broad range of knowledge required to serve a corporate client's needs, firms grew larger and developed specialty practices.<sup>43</sup> Corporate attorneys counseled clients on major transactions and kept them out of lawsuits. Technical expertise and prudent judgment, rather than dramatic courtroom flair, became the key to success.<sup>44</sup>

#### *A. The Innovation of Social Trustee Professionalism: The Organized Bar's Push for Ethical Canons and Educational Reform*

The power and prominence of the corporate bar gave birth to the first age of modern American lawyering and the innovation of social trustee professionalism. Close relationships between corporate lawyers and business leaders led to renewed skepticism about the legal profession's sensitivity to the needs of everyday people, a painful reminder of the Jacksonian era.<sup>45</sup> A model of social trustee professionalism offered an attractive solution by anchoring lawyers' authority and status not just in demonstrated mastery of specialized knowledge and skills but also in an obligation to serve the greater good.<sup>46</sup> By treating law as a calling rather than an ordinary occupation, social

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40. LARSON, *supra* note 36, at 104, 124-25, 145; Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL 75, 78 (Anthony T. Kronman ed. 2004).

41. SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE (3d ed. 1993).

42. LARSON, *supra* note 36, at 170. Interestingly, descriptions of lawyers as "natural aristocrats" persisted, but this time their status was linked to the fact that they would "not . . . litigate but . . . [would] work with businessmen, especially in Wall Street." ROBERT STEVENS, LAW SCHOOL 23 (1983) (quoting Benjamin Silliman, Commencement Address at Columbia Law School (1867)). This shift would be reflected in innovations in legal education. For those who embraced Langdell's vision of legal science, the lawyer-statesmen of an earlier era were dismissed as "oratorical windbags." Gordon, *supra* note 40, at 79.

43. ROBERT L. NELSON, PARTNERS WITH POWER 8 (1988); John P. Heinz, Robert L. Nelson, & Edward O. Laumann, *The Scale of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANN. REV. SOC. 337, 338-39, 342-46 (2001).

44. LARSON, *supra* note 36, at 170.

45. *Id.*; see also MICHAEL POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE 9-11 (1988); BRINT, *supra* note 10, at 33 (cleavages between corporate lawyers and other attorneys hampered solidarity in the profession).

46. BRINT, *supra* note 10, at 36-37; LARSON, *supra* note 36, at 28.

trustee professionalism distinguished lawyers from tradesmen motivated by wages as well as entrepreneurs motivated by profits.<sup>47</sup> The esoteric nature of legal expertise coupled with a public-spirited commitment to service enabled the bar to justify special treatment for its members, most notably self-regulation and monopoly privileges.<sup>48</sup>

Insofar as public-regarding claims remained largely rhetorical, there was a risk that lawyers would be unmasked as mere hired guns who used their expertise to single-mindedly advance clients' interests. The bar hit upon a strategy that would demonstrate its authentic regard for the public while advancing some interests of its own. This strategy turned on highlighting the need for quality control in the profession to protect society from unfit practitioners. Elite members of the organized bar were alarmed that immigrant and Jewish lawyers had been entering the profession in unprecedented numbers.<sup>49</sup> Bar leaders feared that these newcomers would lower the esteem in which the profession was held—because of both their social origins and the cases they would bring. Struggling to find a niche in urban legal markets, foreign-born and Jewish attorneys often represented the poor and working class in disputes over wages, industrial accidents, and labor practices.<sup>50</sup> Corporate attorneys quickly concluded that with clients like these, the arriviste lawyers were no gentlemen.<sup>51</sup> Still, given that Jacksonian reforms had devastated the organized bar only a few decades before, powerful practitioners had to appear principled and public-minded even as they sought to thwart the influx of new attorneys.<sup>52</sup>

Founded in 1878,<sup>53</sup> the American Bar Association (ABA) addressed the difficulty in two ways, both designed to preserve elite prerogatives. First, in 1908, the ABA adopted a Canon of Ethics, which states quickly

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47. LARSON, *supra* note 36, at 61.

48. *Id.* at 12, 14-15, 46, 48, 52-54, 222-23; JAMES W. HURST, *THE GROWTH OF AMERICAN LAW* 323 (1950); BRINT, *supra* note 10, at 34, 67, 69; Broadbent et al., *supra* note 35, at 22-23; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583-84 (1999).

49. AUERBACH, *supra* note 17, at 40-41; Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-22*, 5 *PERSPECTIVES IN AMERICAN HISTORY* 551, 574-75, 578-80, 584-86 (1971) [hereinafter Auerbach, *Enmity and Amity: Law Teachers and Practitioners*].

50. AUERBACH, *supra* note 17, at 40-41; LARSON, *supra* note 36, at 173.

51. LARSON, *supra* note 36, at 173-74; AUERBACH, *supra* note 17, at 50-52; Auerbach, *Enmity and Amity: Law Teachers and Practitioners*, *supra* note 49, at 585-86.

52. LARSON, *supra* note 36, at 119 (noting the distrust of lawyers as agents of the wealthy during the period of Jacksonian democracy); Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 *ST. MARY'S L.J.* 343, 349-50, 355 (2008); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 *FLA. L. REV.* 977, 994, 996-98 (2003).

53. LARSON, *supra* note 36, at 170. Several urban bars were created before the ABA was established to be a national voice for the profession. *Id.* at 170-71.

adopted.<sup>54</sup> In response to anxieties about the commercialization of law practice, the Canon prohibited advertising and aggressive solicitation of clients and subjected contingent fees to special scrutiny.<sup>55</sup> The provisions effectively codified a vision of practice based on “a small homogeneous community whose members enjoyed shared values, ease of communication, and a network of mutually reinforcing educational, religious, and social ties.”<sup>56</sup> This approach worked well for attorneys in small towns as well as for the tight-knit, upper-class bar in large cities. However, the strictures hampered urban lawyers who served poor, immigrant, and working-class clients unfamiliar with how to obtain legal assistance.<sup>57</sup> As historian Jerold Auerbach notes, the ABA’s ethical code “consigned the lawyer to his office to await a client who wandered by with a case that assured fame and fortune, and attributed success (hardly unrelated in American society to material accumulation) to good character.”<sup>58</sup> The upshot was that “[a]mbulance chasers became the scapegoats in a heterogeneous profession increasingly populated by foreign-born lawyers.”<sup>59</sup>

A similar dynamic arose at the local level. In New York City, for instance, patrician elites founded the Association of the Bar of the City of New York (ABCNY), an organization so exclusive that it represented only about ten percent of the profession one year after its founding in 1870.<sup>60</sup> This allowed the “best men” of the bar to distance themselves from the undeserving and uncouth who treated law like a trade.<sup>61</sup> Membership was so restricted that nearly forty years later, in 1908, the New York County Lawyers Association was founded to represent the profession as a whole.<sup>62</sup> Though its membership grew rapidly, it did not challenge the ABCNY’s dominant position, which was grounded in the power and influence of its privileged members.<sup>63</sup>

To preserve the corporate bar’s prerogatives, the ABA took a second and perhaps even more momentous step: increasing the educational requirements for admission to practice. The campaign to raise standards reflected longstanding resistance to “[t]he idea that law

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54. MORGAN, *supra* note 30, at 45-46; AUERBACH, *supra* note 17, at 42.

55. AUERBACH, *supra* note 17, at 43-48.

56. *Id.* at 42. According to historian Lincoln Caplan, the code also was a response to scandals related to the railroad industry in which lawyers participated in bribery of legislators and improper influence of judges. LINCOLN CAPLAN, SKADDEN 124-25 (1993).

57. AUERBACH, *supra* note 17, at 42-44.

58. *Id.* at 43.

59. *Id.* at 48.

60. POWELL, *supra* note 45, at 15.

61. *Id.* at 14-15.

62. *Id.* at 29.

63. *Id.* at 28-29, 32.

was a trade to be learned like any other.”<sup>64</sup> Bar leaders believed that shifting from unregulated apprenticeships to standardized formal training would distinguish law as a calling. At the same time, a common educational experience could weed out the unworthy and unify an otherwise fragmented profession.<sup>65</sup> Beginning in the late 1800s, ABA officials endorsed the superiority of law school training, and in 1900, these efforts spawned the Association of American Law Schools (AALS), an organization of academics dedicated to promoting the interests of “reputable” schools.<sup>66</sup> The AALS initially was formed because of law faculty’s dissatisfaction with the slow pace of reform in legal education, but the ABA and the AALS eventually forged a close working partnership.<sup>67</sup> Their joint efforts to elevate standards at first met with little success.<sup>68</sup> Instead, the number of lawyers continued to grow, and law schools of all kinds proliferated.<sup>69</sup>

Bar leaders felt especially aggrieved by these setbacks because of the rapid progress the medical profession had made in controlling practitioner quality through enhanced educational requirements.<sup>70</sup> In 1904, the American Medical Association founded the Council on Medical Education, which obtained Carnegie Foundation support for a comprehensive study done under the direction of educator Abraham Flexner.<sup>71</sup> The Flexner report, published in 1910, prompted states to impose higher admissions standards for medical schools and to require “scientific” instruction by qualified faculty in suitable medical facilities.<sup>72</sup> These mandates succeeded in driving out marginal institutions, particularly part-time and night medical schools.<sup>73</sup> The thoroughgoing transformation of medical education was “galling” to ABA leaders who had long worried about the deleterious effects of proprietary law schools with part-time programs of questionable quality.<sup>74</sup>

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64. STEVENS, *supra* note 42, at xv. These efforts were supported by local bar associations, such as the ABCNY. POWELL, *supra* note 45, at 36.

65. See STEVENS, *supra* note 42, at xv-xvi.

66. *Id.* at 96.

67. *Id.* at 96-97, 112.

68. LARSON, *supra* note 36, at 173; STEVENS, *supra* note 42, at 27-28, 93-99.

69. STEVENS, *supra* note 42, at 74-81.

70. *Id.* at 112.

71. *Id.* at 102.

72. See *id.*

73. *Id.* at 102-03.

74. *Id.*

*B. Analytical Legal Education, Expert Professionalism, and the “Harvardization” of Law Schools*

Flexner triumphed by arguing that “formal analytical reasoning, the kind of thinking integral to the natural sciences, should enjoy pride of place in the intellectual training of physicians.”<sup>75</sup> Thanks to Christopher Columbus Langdell, dean of the Harvard Law School, the bar was able to make similar arguments about legal education, tacitly drawing on a paradigm that prized technical expertise over other professional virtues. In the late 1800s, Langdell pioneered a number of reforms based on a model of scientific inquiry, which he called the case method.<sup>76</sup> This method allowed students to discover legal principles by treating appellate cases as data points that led to inferences about doctrinal rules.<sup>77</sup> Students could master these techniques through Socratic instruction that forced them to extract underlying legal principles from carefully curated decisions.<sup>78</sup> The “Harvardization”<sup>79</sup> of the law school curriculum justified heightened admissions criteria so that students would have the intellectual capacity necessary to master this complex method.<sup>80</sup> Like Flexner’s approach to medicine, Langdell’s account of law linked the profession to “a unitary, self-contained, value-free, and consistent set of principles.”<sup>81</sup> Langdell believed that young faculty, untainted by lengthy experience in practice, would absorb the method, transmit it to students, and develop an independent voice to counter the bar’s conventional thinking.<sup>82</sup>

Langdell’s emphasis on the science of law often has been equated with a desire for academic respectability and an aversion to identification as a trade school.<sup>83</sup> But there is likely more to the story than that. Though rooted in the bar’s efforts to promote social trustee professionalism, the embrace of scientific methods of instruction planted the seeds of expert professionalism by sidelining efforts to develop the meaning of public obligation. While elaborating the case method, Langdell and his disciples studiously avoided matters of public law

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75. Molly Cooke, David M. Irby, William Sullivan, & Kenneth M. Ludmerer, *American Medical Education 100 Years after the Flexner Report*, 355 NEW ENGL. J. MED. 1339 (2006).

76. STEVENS, *supra* note 42, at 52-53.

77. *Id.*

78. *Id.* at 52-53; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 4-7 (2007); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL 26 (2007); Carrie Menkel-Meadow, *Taking Law and \_\_\_ Really Seriously: Before, During and After “The Law,”* 60 VAND. L. REV. 555, 560-63 (2007).

79. Gordon, *supra* note 40, at 80.

80. See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1973-75 (2012).

81. STEVENS, *supra* note 42, at 53.

82. *Id.* at 38.

83. *Id.* at 40-41.

despite the nascent growth of legislation and regulation. That artful maneuver was motivated in part by market considerations. Schools that taught law as statecraft repeatedly failed, while those that focused on private practice thrived.<sup>84</sup> A value-neutral science also was an appealing way to deflect the aftermath of recent ruptures that had rocked Harvard Law School and strained its bonds of collegiality. There were, for example, profound disagreements about slavery in the 1850s, federal authority over the South in the postbellum era, and the rise of large-scale capitalist enterprises at the turn of the century.<sup>85</sup> Professors elsewhere on campus had been dismissed when they took positions on these issues that offended conservative trustees of the Harvard Corporation.<sup>86</sup> As legal historian Robert W. Gordon observes, “[a] law dean trying to sell the practical virtues of a theoretical training to a skeptical and conservative bar might well want to avoid the swamp of interdisciplinary work and the third rail of public law and policy issues.”<sup>87</sup>

The case method consolidated a narrow notion of obligation, one that focused on law as a self-contained, largely private universe in which attorneys fulfilled their public responsibilities by assisting courts in administering justice and developing doctrine. Between 1870 and 1920, Harvard’s instructional approach became so dominant that some feared it was an “educational octopus.”<sup>88</sup> In fact, Harvard’s wide reach normalized and legitimated uniform instructional standards that entrenched the case method and thus limited efforts to develop the meaning of public obligation elsewhere, for example, at part-time and night schools that served immigrant lawyers who became active in politics.<sup>89</sup> As the educational octopus spread, the ABA successfully sought funding from the Carnegie Foundation for two studies to evaluate legal education.<sup>90</sup> The first of these, the Redlich report, was published in 1914 and addressed ongoing controversy about whether all law

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84. Gordon, *supra* note 40, at 79.

85. *Id.* at 79-80.

86. *Id.* at 80.

87. *Id.*

88. GLEASON L. ARCHER, *THE EDUCATIONAL OCTOPUS* 275-78 (1915). Gleason Archer was the dean of Suffolk, a proprietary law school in Boston, who vigorously opposed efforts to force all institutions to conform to an academic model of legal education. STEVENS, *supra* note 42, at 175-76.

89. See STEVENS, *supra* note 42, at 41-42. Elevated standards came at a price. Initially, the cost of legal training at Harvard was comparable to that of the most expensive apprenticeships. From 1869 to 1879, however, the expense rose by 450 percent as academic law schools enhanced their reputation and reach. DANIEL K. COQUILLETTE AND BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT* 51, 413-14 (2015). The fees at national law schools also came to be substantially higher than those at night schools that served working men in urban areas. Auerbach, *Enmity and Amity: Law Teachers and Practitioners*, *supra* note 49, at 577.

90. STEVENS, *supra* note 42, at 112.

schools should be Harvardized.<sup>91</sup> The Carnegie Corporation chose Josef Redlich, a law professor from the University of Vienna, to serve as a neutral arbiter among the warring factions.<sup>92</sup>

Redlich, an outsider steeped in the civil law traditions of his home country, endorsed the case method with some reservations.<sup>93</sup> He acknowledged its advantages as a tool for practical training of lawyers. Unlike classroom lectures, the Socratic method engaged students and forced them to think for themselves.<sup>94</sup> However, Redlich rejected some of the method's scientific pretensions. In his view, forcing students to grapple with cases was just a more refined version of an apprenticeship, which also used judicial decisions as raw material but in a far less structured way.<sup>95</sup> Moreover, Redlich questioned the theoretical foundations of the case method as a form of natural science. In his view, law was "a normative science (Normwissenschaft)" that "does not work . . . with physical facts, but with the products of the human will, which has been directed to the ordering and guidance of the individual and social life of humanity."<sup>96</sup> Precisely because law was a set of "definite norms, willed by men, and intended to guide and limit the business of men,"<sup>97</sup> Redlich called on law professors to systematize and reform doctrine rather than serve as "industrious commentator[s]" who merely described it.<sup>98</sup> His report, while affirming the worth of the case method, prodded legal educators to acknowledge the potentially far-reaching implications of social trustee professionalism, implications that Langdellian formalism had elegantly elided.

The second Carnegie-funded report by Alfred Z. Reed was published in 1921 and raised new questions about the ABA's vision for legal education.<sup>99</sup> Reed, a non-lawyer member of the Carnegie staff, was another outsider to the profession.<sup>100</sup> By design, his study amplified Redlich's, which had been based on observations of just ten of the over

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91. JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* (1914).

92. JAMES R. MAXEINER, *EDUCATING LAWYERS NOW AND THEN*, 35 INT'L J. LEGAL INFO. 1, 7 (2007).

93. Redlich himself noted "the extraordinary difficulties" that arose because of "the complete dissimilarity between the law of England and America and that of continental Europe." REDLICH, *supra* note 91, at 3. Indeed, the Carnegie Corporation's choice of Redlich may have been motivated by a desire to promote a model of German model of higher education in American law schools. *Id.* at 8-9.

94. *Id.* at 27.

95. *Id.* at 37-40, 58. Redlich suggested curricular reforms that would make law school training even more comprehensive than apprenticeships. *Id.* at 41-47.

96. *Id.* at 56.

97. *Id.*

98. *Id.* at 62-65.

99. ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921).

100. STEVENS, *supra* note 42, at 112.



120 schools then in operation. All ten were elite institutions that mainly relied on the case method.<sup>101</sup> Redlich had recognized stratification in legal education,<sup>102</sup> but Reed made it a centerpiece of his evaluation. Reed acknowledged the relevance of social trustee professionalism by noting not only law's private aspects but also its role as "part of the governing mechanism of the state," which made it "in a broad sense political."<sup>103</sup> With lawyers performing a wide variety of tasks in the public and private domain, Reed found the notion of a unified bar inherently implausible. He called for different types of law schools to prepare students for distinct sectors of practice.<sup>104</sup> Reed's conclusions were anathema to bar leaders and legal educators seeking to standardize law schools and consolidate the profession's standing. The ABA, working closely with the AALS, responded that same year with the Root report, which asserted that: "In spite of the diversity of human relations with respect to which the work of lawyers is done, the intellectual requisites are in all cases substantially the same . . . . All require high moral character and substantially the same intellectual preparation."<sup>105</sup>

Despite some unexpected findings in the two Carnegie reports, the ABA and AALS ultimately prevailed in implementing most of their reform agenda. After World War I, the organized bar enjoyed newfound respect because of legal services rendered to veterans and others in need during the conflict.<sup>106</sup> Buoyed by this goodwill, the ABA finally began to make progress in its push for elevated standards. Formal training at academic law schools became increasingly uniform and largely displaced apprenticeships.<sup>107</sup> Though proprietary law schools and part-time night programs survived, they were modeled on elite academic law schools.<sup>108</sup> Efforts to raise standards culminated in today's system of law school accreditation, which promotes a unified vision of preparation for law practice by asking all law schools to demonstrate the qualifications of students and faculty, the rigor of the curriculum, the soundness of facilities, and the adequacy of library resources.<sup>109</sup>

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101. *Id.* at 112-13.

102. REDLICH, *supra* note 91, at 70.

103. REED, *supra* note 99, at 3.

104. *Id.* at 417-18.

105. Elihu Root, Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association, 7 AM. L. SCH. REV. 671, 681 (1921).

106. LARSON, *supra* note 36, at 174.

107. STEVENS, *supra* note 42, at 10.

108. U.S. News & World Report ranked nearly 80 part-time law school programs in the United States in 2016. *Best Grad Schools—Law, Part-Time Law*, U.S. NEWS & WORLD REP. (2016), at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/part-time-law-rankings/>.

109. See Standards 301(a), 401, 501-503, 601-606, 701-702, *ABA Standards and Rules of Procedure for Approval of Law Schools 2015-16*, ABA SECTION OF LEGAL EDUC. &

*C. Legal Aid Societies and the Limited Vision of Social Trustee Professionalism*

Even as the Harvardization of law schools promoted uniformity in instruction and restricted access to legal training, the limits of the bar's vision for social trustee professionalism were revealed through the ongoing failure to meet the legal needs of burgeoning poor and immigrant populations in urban areas. The German Society of New York founded the first legal aid society in 1876 out of concern for the fate of a growing number of immigrants from the homeland.<sup>110</sup> Eventually, the society broadened its mission to serve all needy clients in the city, but by the end of the nineteenth century, only two other cities, Chicago and Jersey City, had launched similar initiatives.<sup>111</sup> None of these early societies were started by bar associations, despite lofty rhetoric about preserving the integrity of the justice system for all.<sup>112</sup> In the early 1900s, local bars began to establish some legal aid programs, and a handful of law schools opened clinics to serve the poor.<sup>113</sup> The first such clinic, launched at the University of Denver Law School, was designed to provide practical training; by contrast, the student-initiated and student-run Harvard Legal Aid Bureau was a response to the dire legal needs of Boston's poor.<sup>114</sup>

These local efforts did not garner national attention until Reginald Heber Smith received funding from the Carnegie Foundation to study legal aid societies, which in turn led to publication of his pathbreaking book on *Justice and the Poor*.<sup>115</sup> Smith, a Harvard Law School graduate from a well-to-do family, eventually worked with leading lawyer and former Supreme Court Justice Charles Evan Hughes to advance the cause of legal aid around the country.<sup>116</sup> These efforts relied entirely on private philanthropy and met with only modest success. Indeed, with a need to cultivate wealthy benefactors and to temper hostility from the

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ADMISSIONS TO THE BAR. The AALS imposes additional requirements on its member schools, related to research and core values like diversity and non-discrimination. Association of American Law Schools 2016 Handbook, art. 6, § 6-1, AALS (2016). Various commentators have questioned the homogeneity required by the accreditation standards. See, e.g., TAMANAHA, *supra* note 29, at 26-27, 31; STEVENS, *supra* note 42, at 209-10; George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2133-34, 2249-57 (1998); Spencer, *supra* note 80, at 2000-01; David Segal, *For Law Schools, a Price to Play the A.B.A.'s Way*, N.Y. TIMES, Dec. 17, 2011.

110. EARL JOHNSON, JR., 1 TO ESTABLISH JUSTICE FOR ALL 3-7 (2014).

111. *Id.* at 7-18.

112. *Id.* at 18.

113. *Id.* at 19-20.

114. *Id.*

115. REGINALD HEBER SMITH, JR., JUSTICE AND THE POOR (1919); JOHNSON, *supra* note 110, at 21-22.

116. JOHNSON, *supra* note 110, at 22-25.

organized bar, the societies shied away from challenging substantial corporate interests that might harm the poor.<sup>117</sup> Private efforts never produced enough attorneys to satisfy demand among the needy. Even in 1962, over forty years after Smith's book was published, there were still "the equivalent of only 400 full-time legal aid lawyers . . . to represent over thirty-seven million low-income people . . . ."<sup>118</sup> One significant stumbling block was "the failure of local bar associations to give leadership, and in many cases the hostility of lawyers to the idea," which in turn was attributed to "unfounded fear of competition, inherent lethargy, or mere lack of interest."<sup>119</sup> The thinly realized rhetoric of social trusteeship was no match for concerns about the dynamics of the legal marketplace, which depended on generating revenue through client service.

The failures of legal aid were only the most glaring example of the limits of social trustee professionalism. At every turn, the rhetoric of public-regarding obligation met the reality of the market for legal services. Indeed, the very notion of social trusteeship was born of the need to soften the implications of a new kind of elite expertise, the technical know-how to serve large corporate interests. The ethical canons, aimed at lawyers who served the less fortunate, hardly touched the sheltered preserve in which a small cadre of influential lawyers served a similarly small enclave of wealthy clients. These powerful interests could not be offended through activist interpretations of the public good. And, so social trusteeship was equated with tending to the integrity of the administration of justice. This focus on process reinforced the commitment to the formal neutrality of legal principles. The Harvardization of legal education was driven by similar dynamics. Students wanted practical skills, and conservative university trustees wanted to avoid high-profile controversies about public values. Taken together, the legal profession and legal education offered a rather crimped understanding of social trustee professionalism that would be challenged during the next age of modern American lawyering. The focus on preserving the integrity of courts and preparing students to grapple with judge-made law left the profession ill-prepared for the rise of the administrative state and the arrival of a new breed of government lawyer.

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117. *Id.* at 39-40. Structural reforms in fact were part of the vision set forth in Reginald Heber Smith's seminal book on legal aid. SMITH, *supra* note 115, at 200-09. For an in-depth description of these dynamics in Boston, Chicago, and New York, see Mark Spiegel, *Legal Aid 1900 to 1930: What Happened to Law Reform?*, 8 DEPAUL J. FOR SOC. JUST. 199 (2015).

118. JOHNSON, *supra* note 110, at 38.

119. EMERY BROWNELL, *LEGAL AID IN THE UNITED STATES* 29 (1951).

## II. THE SECOND AGE OF MODERN AMERICAN LAWYERING: THE RISE OF THE ADMINISTRATIVE STATE AND THE ASSAULT ON LANGDELLIAN FORMALISM

The second age of modern American lawyering arose in response to the New Deal and the growth of the administrative state. Even before President Franklin Delano Roosevelt began pursuing bold reforms in the late 1930s and early 1940s, a progressive movement had arisen that deployed law as a tool for social change. Reflecting the newfound independence that Langdell had hoped for, law professors questioned a court-centered, scientific jurisprudence and insisted on more far-reaching professional duties. In 1906, William Draper Lewis of the University of Pennsylvania bemoaned the fact that the organized bar lacked a sense of obligation to the community and urged practitioners to look to “the administration of justice in its broadest sense.”<sup>120</sup> Lewis believed that law schools had a special responsibility to train students to deal with affairs of state by including more public law in the curriculum.<sup>121</sup> During this period, Roscoe Pound advocated that law be used for “social engineering” and led “the revolt against formalism” that culminated in the rise of legal realism; later, he retreated from these views when he became dean of Harvard Law School.<sup>122</sup> In 1911, Yale professor William R. Vance bemoaned the bar’s conventionality and its resistance to placing social concerns ahead of client interests.<sup>123</sup> In fact, among practicing lawyers, groundbreaking advocate and later Supreme Court Justice Louis Brandeis stood out both for his receptivity to considering the general good as “counsel for the situation” and for his endorsement of an activist role for faculty.<sup>124</sup> A few law schools acted on this progressive vision. The University of Wisconsin pioneered efforts to train government administrators and began to advise state officials on policy questions. The Wisconsin idea had considerable appeal to law professors, who imagined that their unique expertise would make them influential figures in public life.<sup>125</sup>

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120. William Draper Lewis, *Legal Education and the Failure of the Bar to Perform its Public Duties*, AALS PROC. 32, 48-49 (1906).

121. *Id.* at 49.

122. STEVENS, *supra* note 42, at 136. Legal realists eventually labeled Pound “an arch-reactionary” because of the conservative stances he took. *Id.*

123. William R. Vance, *The Ultimate Function of the Teacher of Law*, 3 AM. L. SCH. REV. 2, 6-8 (1911).

124. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1501-11 (1996); see also William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568-69 (1985). Brandeis described a law school professorship “as a fulcrum in efforts to improve the law and through it—society.” AUERBACH, *supra* note 17, at 82.

125. AUERBACH, *supra* note 17, at 84-86.

Using law as a tool for social change often turned on growing the government bureaucracy. Bar leaders worried that administrative agencies could undermine judicial authority. As early as 1916, Elihu Root wrote that: “We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts.”<sup>126</sup> After acknowledging that “[t]here will be no withdrawal from these experiments,” Root warned that “the powers that are committed to these regulatory agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated.”<sup>127</sup>

*A. The Rise of the New Deal and the Anxiety of the Organized Bar*

In the 1930s, the New Deal led to unprecedented growth in federal regulatory power and brought anxieties about a sprawling and uncontrolled bureaucracy to the fore. Leading corporate lawyers saw the Roosevelt Administration’s reforms as a direct attack on the courts and the profession. As one Chicago attorney put it, “[o]ur prime function is to implement the existing order. Its sudden destruction . . . implies our own.”<sup>128</sup> Despite this intensely felt opposition to New Deal reforms, ABA leaders felt the need to tread lightly in expressing their dissent. For one thing, the public saw corporate lawyers as complicit in predatory practices and market manipulations that had precipitated the Great Depression and made the New Deal necessary.<sup>129</sup> With some misgivings, in 1934 the ABA’s General Assembly authorized a New Deal committee with a broad charge to “study the effect of recent developments in national legislation and governmental policies, as affecting the rights and liberties of American citizens and the maintenance of the guarantees furnished by the United States Constitution.”<sup>130</sup> The committee proved an ill-fated enterprise. As a

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126. Elihu Root, *Address of the President*, 2 A.B.A. J. 736, 749 (1916). For an in-depth discussion of the early contests over the courts’ role in checking the discretion of administrative agencies, see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* at 9-50 (2014); Blake Emerson, *The Administration of Constitutional Conflict: Structural Transformations in American Public Law, 1877-1946*, in *QUADERNI FIORENTINI PER LA STORIA DEL PENSIONERO GIURIDICO MODERNO: GIURISTI E STATO SOCIALE*, No. 46, vol. I at 388-94 (Giovanni Cazzetta ed. 2017).

127. Root, *supra* note 126, at 749-50.

128. AUERBACH, *supra* note 17, at 192.

129. *Id.* at 192-93; SHAMIR, *supra* note 19, at 46, 51.

130. *Proceedings of the Fifty-Seventh Annual Meeting of the American Bar Association*, 59 A.B.A. REP. 47, 153 (Aug. 1934); *see also* SHAMIR, *supra* note 19, at 51.

result of substantive disagreements and personality conflicts, members wrote different draft reports, none of which could be accepted and submitted in final form.<sup>131</sup> Despite calls to abandon the effort entirely, a new committee was appointed; it produced a majority report, a minority report, and a concurring memorandum.<sup>132</sup> Ultimately, the ABA leadership had to bury the committee's work because it offered nothing in the way of practical recommendations.<sup>133</sup>

One year earlier, the ABA had charged the Committee on Administrative Law with the narrow task of evaluating "the adequacy and efficiency of the [government] machinery employed" rather than its purposes and constitutionality.<sup>134</sup> Yet, this committee also had been hamstrung by divergent agendas. Some solo practitioners demanded that the ABA denounce the use of non-lawyers in the administrative process as a way to preserve a growing market for licensed attorneys.<sup>135</sup> Still others wanted to avoid any ABA action that would jeopardize their already established specialty practices before administrative agencies.<sup>136</sup> Corporate lawyers pushed to bring controversies back into the courts or at least to impose a quasi-judicial process on agencies.<sup>137</sup> Faced with competing demands, the committee chair worried that a report to the General Assembly would expose a divided bar. The ABA president apparently agreed, observing that "it would be a good break for [the chair] if he didn't have any time to explain the report and if the report went through more as a formal practice" because "the most dangerous thing he could do is try to explain it."<sup>138</sup> Over some pointed dissent, the General Assembly ultimately approved the report, though New Dealers dismissed the calls for judicial review and quasi-judicial processes as a product of the ABA's hostility to the Roosevelt Administration.<sup>139</sup>

Ongoing skirmishes over leadership revealed the ABA's dilemma in addressing New Deal reforms. Some bar leaders wanted to take a hard line against any changes, while others wanted to adopt a relatively noncommittal stance as a hedge against uncertainty.<sup>140</sup> Confronted with

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131. SHAMIR, *supra* note 19, at 54-58.

132. *Id.* at 59.

133. *Id.* at 60-62.

134. Louis G. Caldwell, *Report of the Committee on Administrative Law*, 56 A.B.A. REP. 199 (Aug. 1933); SHAMIR, *supra* note 19, at 105-06.

135. SHAMIR, *supra* note 19, at 93-99. Lawyers made similar efforts at the state bar level. RICHARD L. ABEL, *LAWYERS ON TRIAL* 4 (2011) (describing California lawyers' calls to end "encroachment" by non-lawyers appearing before state agencies).

136. SHAMIR, *supra* note 19, at 110.

137. *Id.* at 99-102, 110-11.

138. *Id.* at 107 (citing Proceedings of the Executive Committee, ABA 121 (Aug. 1934)).

139. *Id.* The report had no immediate effect, but over time, a number of its procedural recommendations were adopted. *Id.* at 107-09.

140. *Id.* at 57-59, 62.

the ABA's wavering efforts to chart a middle course, members with strong views defected to create organizations of their own. Elite corporate attorneys formed the National Lawyers' Committee of the American Liberty League to contest the legality of federal agencies' expanded authority.<sup>141</sup> These attorneys made their hostility to the Roosevelt administration plain and openly counseled clients to defy government mandates as unconstitutional usurpations of power.<sup>142</sup> By contrast, lawyers who supported New Deal programs saw the changes as an opportunity to reinvigorate the profession's public-regarding obligations. In late 1936, some of these attorneys founded the National Lawyers Guild as an alternative voice for the profession.<sup>143</sup> The Guild rejected "the corporate law identity of the ABA" as well as "its active involvement in conservative politics."<sup>144</sup> Law professors joined liberal and radical attorneys to lead the effort; notably, the executive board included Charles Hamilton Houston, the African-American dean of Howard Law School, at a time when the ABA remained all-white.<sup>145</sup> The Guild primarily appealed to "low-income, low-status urban practitioners along the East and West coasts,"<sup>146</sup> the very kind of lawyers that elite practitioners had seen as a threat to the profession during the first age of modern American lawyering.

Though unanimous in rejecting the ABA's leadership, Guild members agreed about little else. Internal politics, especially clashes between liberal and radical factions, "prevented the guild from becoming the powerful counterweight to the ABA that its founders had envisioned."<sup>147</sup> However, some local chapters launched innovative programs to provide neighborhood legal services to low- and middle-income clients.<sup>148</sup> These efforts were especially noteworthy, given the organized bar's general indifference to problems of the needy.<sup>149</sup> Law professor Karl Llewellyn had hoped that junior attorneys at large firms would staff legal services programs in Chicago on a pro bono basis as an antidote to the profession's rampant individualism and insensitivity to community needs.<sup>150</sup> Privately, he even considered proposing a tax on large firms to subsidize the services but did not pursue the idea, perhaps

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141. AUERBACH, *supra* note 17, at 193.

142. SHAMIR, *supra* note 19, at 67-69.

143. AUERBACH, *supra* note 17, at 198.

144. *Id.* at 199.

145. *Id.* at 200.

146. *Id.*

147. *Id.* at 203.

148. AUERBACH, *supra* note 17, at 203-09.

149. *Id.* at 207.

150. *Id.* at 206.

because he concluded that partners were “so highly specialized in corporate work that they are out of touch with the little man’s need.”<sup>151</sup>

Despite efforts to present a united front, schisms between elite and non-elite practitioners were becoming evident. Confronted with a splintering of authority to speak on behalf of the profession, the ABA was able to reassert itself decisively only when the Roosevelt Administration tried to undermine the power and stature of the United States Supreme Court.<sup>152</sup> The justices had struck down New Deal legislation by constitutionalizing a laissez-faire approach to economic rights, and government officials were determined to nullify the decisions. To do that, President Roosevelt had to take on the “Four Horsemen,”<sup>153</sup> the conservative wing of the Court that had persuaded Justice Owen Roberts to join them in blocking reforms. Roosevelt’s Court packing plan proposed to add one new justice for each member who had served ten years and was over seventy years old. By allowing Roosevelt to appoint six new justices, the plan would leave the Horsemen an outnumbered minority.<sup>154</sup> In fighting this blatant attack on the Court’s legitimacy, the ABA was able to unite its membership in defense of the rule of law and the integrity of the judicial process.<sup>155</sup> The ABA launched a vigorous campaign against Roosevelt’s plan, but the efforts became moot when one of the Horsemen announced his impending retirement and the crucial swing vote, Justice Roberts, changed tack on the constitutionality of New Deal programs.<sup>156</sup> With Roberts’ defection, a majority of the justices supported the Roosevelt Administration’s reforms, the “switch in time that saved nine.”<sup>157</sup>

### *B. Dueling Elites: Government Lawyers and the Corporate Bar*

The battle over the Court’s fate was short-lived, but the effects of shifting government power on the profession were long-lasting. The expansion of federal power created a new avenue to elite status as a lawyer, one that challenged the exclusive prerogatives of the corporate

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151. *Id.*

152. SHAMIR, *supra* note 19, at 77-78.

153. Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 10 (2013).

154. PAUL CARRINGTON, *AMERICAN LAWYER* 531-33 (2012); *THE MAKING OF THE NEW DEAL* 41, 47 (Katie Louchheim ed., Harvard Uni. Press) (1983). For a comprehensive history of the battle over the Court-packing plan, see LEONARD BAKER, *BACK TO BACK* (1967).

155. SHAMIR, *supra* note 19, at 78-80.

156. CARRINGTON, *supra* note 154, at 533-34. Another conservative member of the Court, Justice Sutherland, declared his intent to retire as well. Cushman, *supra* note 153, at 6. Interestingly, President Roosevelt refused to compromise on his Court-packing plan even after Justice Van Devanter announced his retirement. *Id.*

157. Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 459 (2001).



bar.<sup>158</sup> Many Roosevelt Administration attorneys had previously been excluded from the most powerful corporate law firms because they were Jewish or Catholic.<sup>159</sup> These attorneys had gone to elite law schools, but even when they excelled, they found their opportunities blocked at large firms in major cities.<sup>160</sup> With the Roosevelt Administration recruiting attorneys to advance its ambitious reform agenda, some faculty at top schools encouraged their best Jewish and Catholic students to sign on. This entrée to practice was especially important for Jewish students who were clustered at the top of their law school classes but at the bottom of the urban bar.<sup>161</sup>

The New Deal's "plague of young lawyers"<sup>162</sup> was steeped in the knowledge, skills, and values typical of leading law schools, and despite allegations that the freshly minted graduates were radical revolutionaries, they embraced American legalism, especially its preoccupation with process. As a result, administrative agencies ultimately came to rely on notice-and-comment rulemaking, public hearings, and quasi-judicial tribunals.<sup>163</sup> Though some of these gifted attorneys remained in public service, many left to establish firms devoted to regulatory practice or to join new administrative law practice groups at the elite firms that once had shunned them.<sup>164</sup> If New York and Chicago were strongholds of the corporate bar, Washington, D.C. became home to influential firms specializing in administrative law and legislative lobbying.<sup>165</sup> The New Deal gave birth to a cadre of elite lawyers who rivaled the corporate bar, a recalibration of power that

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158. SHAMIR, *supra* note 19, at 78-80.

159. AUERBACH, *supra* note 17, at 185. Blacks and women also faced barriers to inclusion, but the New Deal did little to rectify their limited opportunities. Jerold S. Auerbach, *Lawyers and Social Change in the Depression Decade*, in *THE NEW DEAL* 133, 160 (John Braeman et al. eds. 1975) [hereinafter Auerbach, *Lawyers and Social Change in the Depression Decade*].

160. AUERBACH, *supra* note 17, at 29, 184-86.

161. *Id.* at 184. Felix Frankfurter at Harvard Law School, himself a rarity as a Jewish faculty member at a prestigious school, was an especially prominent source of referrals, but outstanding students also arrived from Yale and Columbia. *Id.* at 169-70; CARRINGTON, *supra* note 154, at 523-24 (describing how Frankfurter's New Deal proteges were referred to as the "Happy Hot Dogs").

162. PETER H. IRONS, *THE NEW DEAL LAWYERS* 2 (1982) (citing George Peek, an agricultural economist who headed the Agricultural Adjustment Administration during the Roosevelt Administration).

163. AUERBACH, *supra* note 17, at 221-24.

164. *Id.* at 226-28. As Bruce Alan Murphy explained in his biography of Abe Fortas, there were "two camps of alumni from the Roosevelt era in 1946: those who labored further for a New Deal for the nation, and those who wanted a 'new deal' for themselves." BRUCE ALAN MURPHY, *FORTAS* 72 (1988).

165. CARRINGTON, *supra* note 154, at 539.

permitted Jews in particular to overcome barriers that had prevented them from converting academic credentials into law firm partnerships.<sup>166</sup>

The struggle over the New Deal was rooted in the corporate bar's resistance to a rival form of lawyering. Given these concerns, one might have expected the ABA to revisit its code of professional conduct to address the ethics of government lawyering. However, internal divisions over the implications of the rise of the administrative state made that approach impossible. As a result, the rise of the New Deal "did not significantly alter lawyers' degree of regulation (or non-regulation) by either legislation, the courts, or their bar associations."<sup>167</sup> Instead, the organized bar focused on conflicts of interest that arose when lawyers went through the "revolving door" of government service to work in private practice. This approach minimized the comparative advantages of administrative lawyers when they left their official posts to compete with the corporate bar for business.<sup>168</sup>

As early as 1908, the ABA had adopted Canon 6, which addressed an attorney's duty to refrain from representing clients whose interests were in conflict with those of another client, in this case, the prior government employer, and to disclose any possible conflicts.<sup>169</sup> That canon made no attempt to address a lawyer's ethical obligations while in government service.<sup>170</sup> In 1928, as the role of state agencies expanded during the Progressive era, the bar adopted Canon 36, which clarified that former government attorneys, including judges, should not accept employment if it related to matters previously handled in an official capacity.<sup>171</sup> Even these admittedly modest strictures were criticized. As Judge Irving Kaufman explained in a 1957 article, an unduly pharisaical application of the canons might discourage attorneys from undertaking public service and inhibit them from using specialized knowledge acquired as government officials.<sup>172</sup>

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166. Auerbach, *Lawyers and Social Change in the Depression Decade*, *supra* note 159, at 144, 150-51.

167. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II the Modern Era*, 15 *GEO. J. LEGAL ETHICS* 205, 222 n.59 (2002).

168. Auerbach, *Lawyers and Social Change in the Depression Decade*, *supra* note 159, at 164; AUERBACH, *supra* note 17, at 228-30.

169. ABA CANONS OF PROFESSIONAL ETHICS, Canon 6 (1908).

170. John C. Blakslee, *Notes on Professional Ethics: Conflicting Interests*, 55 *A.B.A. J.* 162 (1969).

171. ABA CANONS OF PROFESSIONAL ETHICS, Canon 36 (1928). In 1948, Congress enacted legislation that prohibited lawyers from prosecuting claims against the United States for a period of two years if those claims involved subject matter related to prior government service. 18 U.S.C. § 284. These provisions were strengthened in 1962. 18 U.S.C. § 207; H.R. REP. NO. 87-748, at 2, 4, 22-23 (1962); S. REP. NO. 87-2213, at 4, 7, 12 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3852-53, 3856, 3861.

172. Irving R. Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 *HARV. L. REV.* 657 (1957).

With the ABA unable to offer clear guidance on the ethical obligations of government lawyers, the legal academy could have stepped in to fill the gap. However, the legal realist movement, which had inspired so many New Deal attorneys, failed to afford much direction because it mainly attacked the status quo.<sup>173</sup> Without a clearcut model of legal professionalism, agency attorneys came to understand their role in terms of technical expertise, much as officials from other professional disciplines did.<sup>174</sup> This turn from social trustee to expert professionalism went largely unnoticed because government work was automatically equated with service to the general public. That glib equivalency ignored the ambiguities inherent in a political environment that made it difficult to discern who the client was, much less what the client's needs and wishes were. These uncertainties allowed government attorneys to wield considerable authority in making value judgments about the common welfare, a problem that persists to this day.<sup>175</sup> Such wide-ranging discretion could not be readily cabined through a straightforward application of technical expertise. As a result, the gap between value-making and expert professionalism sometimes led to "amoral instrumentalism."<sup>176</sup> As legal historian G. Edward White concluded, an emphasis on pragmatism and experience led to "a relativistic and experimentalist approach toward morals as well as toward other issues."<sup>177</sup> These lacunae in the government lawyer's

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173. Gordon, *supra* note 40, at 100 (describing legal realism as "protean" and subject to myriad interpretations and manipulations). Interestingly, one concrete example of the application of legal realism to real-world problems involved the civil rights movement. In the early 1930s, Columbia law professor Karl Llewellyn wrote a foreword that drew on legal realist principles to support the National Association of Colored People's brief challenging Southern officials' complicity in lynchings and demanding federal intervention. Alfred L. Brophy, "Cold Legal Points into Points of Flame": Karl Llewellyn Attacks Lynching, UNC Legal Studies Research Paper No. 2619895 (June 17, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2619895](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619895).

174. See IRONS, *supra* note 162, at 7-8 (describing how Frankfurter prepared students to serve as "the emerging mandarin of the state"); Gordon, *supra* note 40, at 100 (describing how legal realism led to "a naïve faith in technocracy" or, even worse admiration of "an extremely antidemocratic and even fascist administration if it proved itself 'efficient'"). These trends echoed an emphasis on expertise as the basis for law professors' participation in a Progressive agenda earlier in the century. AUERBACH, *supra* note 17, at 83-84.

175. Abel, *Why Does the ABA Promulgate Ethical Rules?*, *supra* note 10, at 644-45; Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1170 (2002). See also Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1343-45 (2009) (describing how the Model Rules of Professional Conduct focus on the traditional role of lawyers and litigators and fail to address the role of lawyers in a regulatory practice).

176. Note, *supra* note 175, at 1187-88 (questioning the amorality of instrumentalism in government practice and arguing that agency lawyers must "help the agency develop its position in a way that is consistent with democratic values").

177. G. Edward White, *Recapturing New Deal Lawyers*, Lecture at Harvard Law School, Sept. 19, 1989, at 61. White linked this to problems when attorneys left government for

professional identity cried out for guidance, but the bar had none to provide, given the distrust that divided the ABA and the Roosevelt Administration.

*C. Legal Realism, New Deal Activism, and the Triumph of Incremental Curricular Reform*

As the New Deal altered the balance of power between corporate and government lawyers, it also changed the relationship between the legal profession and the academy. Law professors who played an active role in supporting the Roosevelt Administration exemplified Langdell's desire for an independent academy even as they attacked formalism and pretensions to scientific method in adjudication. Yale Law School was a hotbed of legal realism and New Deal activism, commitments that were a self-conscious intellectual revolt against Harvard's octopus-like hegemony. As historian Robert Gordon explains,

Perhaps Harvard's most important contribution to the development of Yale was to give it something solid to define itself by, a heavy successful father both to emulate and to hurl itself against in rebellion. Harvard's was a dogmatic tradition that inspired antidogmatism, a disciplinary isolation that inspired interdisciplinary experiment, a grave condescension and assumption of superiority that inspired the urge to ridicule and destroy.<sup>178</sup>

Directly contradicting the case method, legal realists asserted that jurists do not discover law in a neutral and impartial way but instead are influenced by personal backgrounds, beliefs, and attitudes.<sup>179</sup> Legal realism blurred the boundary between law and politics—both were interest-driven processes of negotiation and compromise—and so undercut the claim that the judicial process is inherently superior to legislative and administrative decision-making.<sup>180</sup> A legal realist perspective bolstered the New Deal's assault on the primacy of courts as the ultimate arbiters of legal principles. The justices who blocked the Roosevelt Administration's reforms could be impugned as captives of

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private practice. As he noted, "[o]ne of the singular aspects of the careers of several prominent New Deal lawyers is their association, after they left government service, with allegedly improper legal or ethical practices." *Id.* at 60. One historian put the point more bluntly, concluding that children of the New Deal simply assumed that the rules did not apply to them. MURPHY, *supra* note 164, at 593-94. Later, abuses by government lawyers during the Watergate scandal would prompt the ABA to promote ethics training in law schools. *See infra* note 198.

178. Gordon, *supra* note 40, at 98.

179. SHAMIR, *supra* note 19, at 141, 143-46; *see also* STEVENS, *supra* note 42, at 134-35.

180. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 168-69, 210-11 (2000).

their own outmoded and tendentious world-views: The Horsemen were riding into the apocalypse, rather than looking to the future.

In the mid-1930s, as the rhetoric of legal realism wore thin at Yale, the New Deal presented a welcome opportunity to put theory into practice.<sup>181</sup> Jerome Frank, an adjunct professor at Yale and member of the Roosevelt Administration, recruited many friends on the faculty for leadership positions at federal agencies.<sup>182</sup> In 1934-35, eight of Yale Law School's professors were "on part-time or full-time loan to the government."<sup>183</sup> As a result, the law school "became thoroughly identified in the public mind with the New Deal, to the perpetual consternation of many Yale College alumni."<sup>184</sup> Campus and law school administrators were forced to "spen[d] an inordinate amount of time fending off conservative complaints that Yale Law School was just an outpost of Roosevelt's Red Revolution."<sup>185</sup> Nor were alumni alone in expressing this concern. By 1939, "the Chicago Tribune illustrated a series about the school with a cartoon showing the Yale law faculty hoisting the hammer and sickle over the Sterling Law Building. An accompanying story said students were more likely to read Karl Marx than William Blackstone."<sup>186</sup>

Given the high-profile controversy, it should come as no surprise that New Dealers on the Yale faculty alarmed and angered conservative academic colleagues.<sup>187</sup> The tensions created an increasingly uncomfortable situation that tested the boundaries of both academic duty and academic freedom. As New Dealers spent more time in Washington, D.C. and away from their academic posts, a number of them were denied appointments, threatened with loss of their teaching positions, or forced to resign.<sup>188</sup> Reflecting on the difficulties, the President of Yale concluded that "law faculties tend to harbor relatively more men of leftward-leaning political tendencies than are found in academic groups generally. It is at variance, I should say, with the prevailing trend in bar and bench and probably reflects the theoretical, as contrasted with the practice, attitudes of mind."<sup>189</sup> In reaching this conclusion, the President—wittingly or unwittingly—lent credence to Langdell's notion that law faculty would be empowered to challenge the practicing bar's conventions. What Langdell might not have fully anticipated, however,

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181. Gordon, *supra* note 40, at 141.

182. *Id.*; ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER* 71-72 (1985).

183. Gordon, *supra* note 40, at 141.

184. *Id.*

185. *Id.*

186. *Id.* at 104-05 (footnotes omitted).

187. *Id.* at 105.

188. *Id.* at 86, 108, 111, 115.

189. *Id.* at 105 (footnote omitted).

were the deep schisms that could emerge when attorneys and academics found themselves at loggerheads over the profession's future.

Despite the *Chicago Tribune's* fear that Yale Law students were more likely to read Marx than Blackstone, changes in the law school curriculum as a result of the New Deal were quite modest. Not surprisingly, given that Harvard's dominance was predicated on Langdellian formalism, its faculty's response to calls for curricular reform was tepid. At a 1937 meeting of the Association of American Law Schools, Professor Sidney Post Simpson described an institution largely satisfied with its dominant pedagogy: "The curriculum of Harvard Law School was completely revised in 1877, and thereafter there were some changes made, some new courses put in, a few old ones taken out, although a law school course seems to be something like a person in the civil service—once it gets in, there it stays."<sup>190</sup> Even so, in 1934, the faculty decided once again to reconsider the school's course offerings.<sup>191</sup> This decision was driven by growing student dissatisfaction with the case method and a bland selection of classes.<sup>192</sup>

Simpson reported that upon careful consideration, the faculty had decided to devote the first two years of instruction to mandated courses so that students would be grounded in "the minimum basic requirements for a member of the bar."<sup>193</sup> Despite the New Deal's transformative impact, Simpson noted that "there is no required instruction in public law at all."<sup>194</sup> Instead, the faculty preferred a wait-and-see attitude to determine whether "the answer is a course, in the second year in constitutional and administrative law, in the institutions of government, as every lawyer must know about them" or "a requirement of some degree of concentration in public law."<sup>195</sup> Rejecting the legal realist approach, Simpson remarked that Harvard's curricular changes did not emphasize legal history or comparative law and jurisprudence, as some sister schools' programs did.<sup>196</sup> Nor was there a course on legal ethics, much less one on the unique ethical challenges facing government

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190. *Address of Sidney P. Simpson, Law School Objectives and Methods: Developments in the Law School Curriculum and in Teaching Methods*, 8 AM. L. SCH. REV. 1038, 1039 (1938) [hereinafter *Address of Sidney P. Simpson*].

191. *Id.*

192. For competing accounts of the events at Harvard, see JOEL SELIGMAN, *THE HIGH CITADEL* 64-67 (1978); ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 283-86 (1967). See generally STEVENS, *supra* note 42, at 137 (describing a student attack on the Harvard curriculum in 1935 as the committee was doing its work).

193. *Address of Sidney P. Simpson, supra* note 190, at 1040.

194. *Id.* at 1042.

195. *Id.* at 1043.

196. *Id.* There were no legal realists on the Harvard faculty at this time. IRONS, *supra* note 162, at 7.

lawyers, an omission for which there were “no apologies to make.”<sup>197</sup> As Simpson elaborated,

[I]f I am sure of anything, it is that a formal course on Legal Ethics is not helpful in [transmitting the tradition of a learned and public profession] . . . or, in my judgment, in any other regard. It may be a course on legal etiquette, which I think is unnecessary. It may be a course in ‘how far a lawyer can safely go,’ which I believe to be pernicious. It may be a course of hortatory moral instruction, which seems to me perfectly useless. Or it may be a bar cram course on the Canons, which seems to me beneath the dignity of the university law school.<sup>198</sup>

As Simpson’s remarks made abundantly clear, Langdellian formalism still carried the day at Harvard—which remained largely free of public law, jurisprudential theories, or even legal ethics. Clearly, the educational octopus would not be growing new tentacles to reach the practice environments of an emerging breed of government lawyers.

By contrast, both Yale and Columbia embarked on ambitious though unsuccessful curricular reform efforts. As early as 1916, Yale considered a program of interdisciplinary study as well as courses in “administration and perfecting its methods of legislation.”<sup>199</sup> This experiment proved premature, but Columbia launched a similar effort in 1928.<sup>200</sup> Reformers emphasized the importance of using the social sciences and empirical methods to train students for public service, and by 1932, Columbia had hired a number of faculty with expertise in disciplines like finance, economics, philosophy, and political science.<sup>201</sup> The call for curricular change split the faculty and alarmed the dean, who worried that any shift would undermine the law school’s standing as “a first-grade professional school” that trained students for private practice.<sup>202</sup> The innovations at Columbia ultimately failed to take root, and some leading proponents decamped for Yale, where the reformist impulse persisted and would take on newfound relevance with the advent of the New Deal.<sup>203</sup>

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197. *Address of Sidney P. Simpson*, *supra* note 190, at 1043.

198. *Id.* In fact, instruction in legal ethics did not become a universal feature of American legal education until the 1970s. The change came at least partly in response to the Watergate scandal in which high-ranking lawyers in the Nixon administration were convicted of criminal misconduct as a result of their ethical lapses. Arnold Rochvarg, *Enron, Watergate and Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 67-68 (2003).

199. STEVENS, *supra* note 42, at 135.

200. *Id.* at 137-40.

201. *Id.* at 139; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 75 (1986).

202. STEVENS, *supra* note 42, at 139.

203. *Id.* at 140-41.

At Yale, professors mainly expressed their support for legal realism by conducting empirical research on legal matters.<sup>204</sup> As faculty returned from service in the Roosevelt Administration, they added upper-division electives that focused on various facets of administrative law.<sup>205</sup> These new courses eventually found their way from elite law schools to less prestigious—even unaccredited—ones.<sup>206</sup> The addition of electives did not fundamentally alter the core curriculum, however, prompting one New Dealer to offer a more ambitious vision. Jerome Frank believed that “clinical-lawyer” schools should be modeled on medical instruction.<sup>207</sup> Directly contradicting Langdell’s hiring philosophy, Frank argued that law professors should have extensive practical experience. This would enable them to use real and simulated legal problems to prepare students for professional life.<sup>208</sup> Frank’s proposal gained little traction among his faculty allies at Yale, not just because they lacked practical experience themselves but also because they worried that the bar’s inherent conservatism would dampen creativity in legal research and teaching.<sup>209</sup> Despite Frank’s call for practice-oriented instruction, most reform initiatives of the day focused on making the law school curriculum either more interdisciplinary, as was true at the University of Chicago, or more specialized, as was true at Northwestern.<sup>210</sup>

During the second age of modern American lawyering, the organized bar once again struggled to preserve the image of a unified profession by suppressing the reality of pluralism in law practice. Earlier, the corporate bar had worked to conceal stratification and to marginalize urban practitioners who served poor, immigrant, and working-class clients. With the arrival of the New Deal, bar leaders had to rebuff a competing source of legal authority: government lawyers at highly influential federal agencies. During the first age of modern American lawyering, there had been considerable social and

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204. *Id.* at 140.

205. *Id.* at 160.

206. *Id.* at 168 n.40. According to legal scholar Edward Rubin, these courses did not—and still do not—address the ethical obligations of a regulatory practice. Rubin, *supra* note 175, at 1345-50.

207. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Gordon, *supra* note 40, at 101.

208. Gordon, *supra* note 40, at 101.

209. *Id.* at 101, 130-31 n.71.

210. Charles T. McCormick, *Leon Green and Legal Education*, 43 ILL. L. REV. 5, 9-11 (1948); *Address of Malcolm P. Sharp, Law School Objectives and Methods: Developments in the Law School Curriculum and in Teaching Methods*, 8 AM. L. SCH. REV. 1038, 1044-45 (1938). Perhaps presciently, Professor Malcolm Sharp predicted that “the other great division of our non-legal material, economics, will prove somewhat easier to integrate with our strictly legal curriculum.” *Id.* For a description of the limited impact that legal realism had on the law school curriculum, see Menkel-Meadow, *supra* note 78, at 567-68.



professional distance between corporate lawyers and upstart urban practitioners. During the second age, bar leaders and the new breed of government lawyer had much in common, even though they were locked in a power struggle. Both were products of elite law schools and shared many professional values, most notably a commitment to legal process. As a result, government lawyers and the organized bar eventually were able to find common ground in a shared commitment to safeguarding the integrity of the courts and to regularizing the administrative process.

The desire for a unified professional image led bar leaders to minimize differences in practice environments that challenged conventional notions about client representation. In particular, government practice upset the assumption that lawyers can readily ascertain and advance client interests. With multiple stakeholders and competing agendas, agency attorneys enjoyed considerable latitude to inject their own preferences into purportedly neutral and impartial decision-making on behalf of “the people.”<sup>211</sup> If private lawyers’ independence came from having their own practices, the salaried government lawyer’s autonomy largely derived from the uncertainty of the client’s identity. Instead of tackling this discrepancy, the bar ignored it, and government lawyers adopted a model of expert professionalism like that of other agency staff, an approach that did little to resolve the special ethical challenges facing government attorneys. As a result, social trusteeship remained an underdeveloped concept, even as Roosevelt Administration lawyers boldly embarked on structural reforms that would transform American life and politics.

The law school curriculum offered a similar picture of stasis in the face of major innovation in lawyering. Although legal realism had offered provocative challenges to the conventional wisdom, this school of thought was less successful in producing affirmative frameworks to understand the implications of New Deal reforms. Concerns about conservative backlash and the ongoing emphasis on placing students in private practice led to curricular changes that were decidedly incremental. In the face of this inertia in the profession and the academy, the relationship between social trustee and expert professionalism remained unclear. This uneasy coexistence produced paradoxical results. Private lawyers who primarily sold their expertise in the marketplace insisted on their roles as social trustees in the service of an

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211. William Josephson and Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty when Clients Are in Conflict?*, 29 HOW. L.J. 539, 539-41 (1986); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 967 (1991); James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1570 (1996).

amorphous public obligation. Meanwhile, government lawyers who served an amorphous client known as the people insisted on their roles as impartial and objective experts. The unsettled distinction between social trustee and expert professionalism was the price of preserving the image of a unified bar. The third age of modern American lawyering would challenge this inherently unstable rapprochement by offering an entirely different account of an attorney's service to clients and public-regarding obligations.

### III. THE THIRD AGE OF MODERN AMERICAN LAWYERING: THE RISE OF CAUSE LAWYERING AND THE PUSH FOR CLINICAL LEGAL EDUCATION AND A PEDAGOGY OF DIVERSITY

The third age of modern American lawyering emerged in the wake of World War II, forged in the segregated and unequal world of the African-American bar and historically black law schools.<sup>212</sup> Excluded from elite legal circles and confronted with limited resources, the National Association for the Advancement of Colored People (NAACP)'s Legal Defense and Education Fund (the Inc. Fund) worked with Howard Law School to launch a litigation campaign that would dismantle state-mandated segregation. These crusading civil rights lawyers placed great faith in the law and its capacity to advance social change. The success of their efforts inspired other forms of cause lawyering, led to the expansion of clinical legal education, and introduced diversity into law school student bodies. Despite the original civil rights advocates' deep commitment to consummate lawyering, the complexity of structural and systemic change led others to question this law-centric framework.

#### *A. Civil Rights: From Law-Centric Credo to Backlash from the Left and the Right*

The Inc. Fund's campaign for civil rights was guided by a belief that law, particularly judge-made law, could catalyze broad social change. As a result, attorneys were essential leaders in efforts to end state-mandated segregation of the races.<sup>213</sup> The persistence of

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212. Though the NAACP and Howard Law School played a leading role in the rise of cause lawyering, the American Civil Liberties Union was also of central importance. See SAMUEL WALKER, *THE AMERICAN CIVIL LIBERTIES UNION: AN ANNOTATED BIBLIOGRAPHY* xvi-xix (1992) (describing the ACLU's founding in 1920 and the path-breaking cases it litigated beginning in the mid-1960s as it made greater use of paid staff attorneys).

213. Thomas Hilbink, *The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 60, 64 (Austin Sarat & Stuart Scheingold eds. 2006); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996). But cf. Kenneth W. Mack, *Rethinking*

segregation itself was a reminder of law's past failures and profound power to subordinate blacks.<sup>214</sup> The races remained separated in significant part because the United States Supreme Court had legitimated the "separate but equal" doctrine in *Plessy v. Ferguson*<sup>215</sup> in 1896, closing off efforts to reconstruct the South after the Civil War. Confronted with real separation but fictive equality, the Inc. Fund set about demonstrating that stark disparities between black and white educational institutions were unacceptable badges of racial inferiority. Along with challenges to disenfranchisement and discrimination in the criminal justice system, the NAACP pursued litigation to promote equal educational opportunity. Early cases targeted graduate and professional programs, where any semblance of equality was hard to achieve given the high cost of quality instruction.<sup>216</sup> After victories in dismantling segregation in higher education, Inc. Fund lawyers turned their attention to public elementary and secondary schools, a strategy that culminated in the Supreme Court's 1954 landmark decision in *Brown v. Board of Education*,<sup>217</sup> which unanimously held that separate schools are inherently unequal.

Challenges to the Inc. Fund's law-centric credo came when the justices temporized on matters of implementation. In *Brown II*,<sup>218</sup> the Court held that school integration should proceed "with all deliberate speed," a gradualism that stymied meaningful progress.<sup>219</sup> Despite this setback, the NAACP maintained its faith in law's remedial possibilities, concluding in its 1963 annual report that: "There is only one way. *Those who believe that rights must be found in law and ultimately rest upon law must make a massive effort to use law to solve America's race problem.*"<sup>220</sup> Despite an unwavering belief in law's promise, the Inc. Fund received no meaningful help from the organized bar. In contrast to the National Lawyers Guild, which had admitted black members from

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*Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 265-71 (2005) (legal liberal interpretations of the desegregation strategy at Howard and the Inc. Fund were imposed after the fact and did not capture the complexity of the decision-making process).

214. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 6-7 (3d ed. 1974).

215. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

216. *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (per curiam); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950). See generally KLUGER, *supra* note 23, at 256-84 (describing the history of the NAACP's efforts to desegregate institutions of higher education). For a description of the early origins of the NAACP's legal agenda, see SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915* at 249-86 (2013).

217. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

218. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

219. *Id.* at 301.

220. Hilbink, *supra* note 213, at 64 (citing NAACP Legal Defense and Education Fund, Annual Report (1963)) (emphasis in original).

its inception, the ABA did not do so until 1943, only eleven years before *Brown* was decided. During the 1950s, the ABA largely ignored the NAACP's campaign for civil rights, and by the 1960s, it still was maintaining a studied distance.<sup>221</sup> Invoking a narrow view of social trusteeship obligations, ABA President Lewis F. Powell, Jr. wrote in 1965 that "the prevailing view is that the Association must follow a policy of noninvolvement in political and emotionally controversial issues—however important they may be—unless they relate directly to the administration of justice."<sup>222</sup>

As the ABA sought to remain neutral on civil rights issues, bar associations in the South, including Powell's home state of Virginia, moved to thwart Inc. Fund lawyers by invoking ethical canons against solicitation and barratry, the very provisions once used to undercut urban immigrant practitioners.<sup>223</sup> Civil rights attorneys regularly held meetings with community members to inform them about the legal assistance available to bring school desegregation claims.<sup>224</sup> As part of massive resistance to the *Brown* ruling, Southern bar associations asserted that the Inc. Fund's outreach efforts were unethical forms of solicitation and demanded sanctions against the lawyers involved.<sup>225</sup> State courts agreed, handing down decisions that would have stifled efforts to enforce *Brown* in federal court.<sup>226</sup> The United States Supreme Court put an end to this obstructionist strategy, finding that the NAACP's activities qualified as protected forms of speech and association under the First and Fourteenth Amendments.<sup>227</sup> Yet, as Supreme Court historian Mark Tushnet has observed, the decision was a close one that could easily have gone the other way.<sup>228</sup>

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221. MOLITERNO, *supra* note 28, at 64. In part, this reflected ongoing concerns that the NAACP had ties to the Communist Party. *Id.* at 66-67.

222. Lewis F. Powell, Jr., *The President's Page*, 51 A.B.A. J. 101, 101 (1965).

223. MOLITERNO, *supra* note 28, at 65, 79.

224. *Id.* at 70.

225. See, e.g., *Virginia Bar Challenges NAACP Methods in School Cases*, THE FREE LANCE-STAR, June 30, 1959; *NAACP Methods Scored in Suit by Virginia Bar*, TUSCALOOSA NEWS, June 30, 1959. See generally MOLITERNO, *supra* note 28, at 70-71.

226. See, e.g., *NAACP v. Harrison*, 202 Va. 142, 146-55, 116 S.E. 55, 60-66 (1960) (condemning the NAACP's "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control").

227. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). The United States Supreme Court later built on the *Button* decision to distinguish between ethical concerns about solicitation in purely commercial settings, *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and protected First Amendment outreach to underserved clients, *In re Primus*, 436 U.S. 412 (1978).

228. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 277-82 (1994).

The Court's endorsement of the Inc. Fund's outreach efforts paved the way for broad reconsideration of ethical restrictions on lawyers' ability to compete on price and advertise.<sup>229</sup> In a Virginia case, a couple challenged the state bar's minimum fee schedules as an antitrust violation. The bar responded that law was a learned profession, rather than a commercial enterprise, so there could be no improper restraint of trade.<sup>230</sup> The United States Supreme Court disagreed, concluding that the fee schedule, far from being flexible and advisory, operated as a rigid floor on prices.<sup>231</sup> Not long thereafter, attorneys at a legal clinic in Arizona sought to advertise their low-cost services. The state bar argued that the "hustle of the marketplace" would "bring about commercialization," "adversely affect the profession's service orientation, irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve," and "tarnish the dignified public image of the profession."<sup>232</sup> Rejecting all of these arguments, the justices concluded that state bars could at most regulate false and misleading advertising.<sup>233</sup> As legal scholar James Moliterno notes, by focusing exclusively on consumer protection, the Court's "false advertising language . . . would now apply to lawyers and used car salesmen alike."<sup>234</sup> Ironically, then, instead of broadening the boundaries of the bar's notions of social trustee professionalism, the civil rights movement actually strengthened a free-market approach to lawyering that elevated expert professionalism.

The uncertain implications of the civil rights movement for social trusteeship were further complicated when activists called into question the primacy of law as a tool for social reform. Lack of progress in enforcing school desegregation mandates led some African-American leaders to question the relevance of attorneys and courts. As an alternative, grass-roots reformers demanded direct action through civil disobedience and organized protest.<sup>235</sup> As legal studies scholar Thomas Hilbink explains, "From the [NAACP's] perspective, the goal was to establish legal principles first and foremost—putting them at odds with activists who saw protest as not merely a way of establishing a principle,

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229. MOLITERNO, *supra* note 28, at 89.

230. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 786-88 (1973).

231. *Id.* at 791-92.

232. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977).

233. *Id.* at 383-84. Most recently, a Florida attorney successfully challenged state bar limits on advertising past results in cases as a violation of commercial speech rights. *Rubenstein v. Fla. Bar*, 72 F.Supp. 3d 1298, 1312-18 (S.D. Fla. 2014).

234. MOLITERNO, *supra* note 28, at 92.

235. Hilbink, *supra* note 213, at 64, 69-71. See generally TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT* 336-39 (2011) (Inc. Fund lawyers neglected community-building despite early recognition of its importance to legal success and alienated some constituencies as a result).

but involving people in their own liberation and thus challenging a culture of oppression.”<sup>236</sup> The tensions came to a head in the 1960s. The Inc. Fund sought to establish clear boundaries for lawyers representing members of the Student Non-Violent Coordinating Committee (SNCC) during voter registration drives in the South. In particular, NAACP lawyers insisted that SNCC activists decline representation by the National Lawyers Guild, a demand that SNCC rejected.<sup>237</sup> Instead, SNCC expressed concerns about the Inc. Fund’s reluctance to file suits to protect protestors’ rights and to defend those who were arrested.<sup>238</sup>

At this point, the relationship between the NAACP and advocates of direct action had grown so tense that President John F. Kennedy thought it necessary to assemble an elite group of attorneys to manage racial unrest in the South.<sup>239</sup> The Lawyers Committee for Civil Rights Under Law (LCCRUL) was co-directed by two leading members of the organized bar: Bernard Segal, a Philadelphia attorney who would become the ABA’s president, and Harrison Tweed, a New York law firm partner and former president of the American Law Institute and the New York City Bar Association.<sup>240</sup> Tweed insisted on adding “under law” to the committee’s name to make clear that the group was dedicated to legal process and condemned violence.<sup>241</sup> As the nomenclature suggested, LCCRUL shared the Inc. Fund’s belief in the primacy of legal remedies, insisting that “the spectacle of repeated violations of law, actual or apparent, by those who are pressing the fight for civil rights is deeply troubling to many thoughtful persons who reject the notion that the end justifies the means . . . .”<sup>242</sup> Initially, Segal and Tweed asked local lawyers in the South to represent activists, but when these efforts proved insufficient, LCCRUL sent attorneys there to give “‘objective’ legal assistance without succumbing to the ‘emotionally-charged atmosphere of Freedom Summer.’”<sup>243</sup>

The eighteen lawyers who ultimately participated were to assist ministers from the National Council of Churches in their efforts to counter repressive tactics designed to suppress civil rights activism.

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236. Hilbink, *supra* note 213, at 64, 69-71.

237. *Id.* at 65.

238. *Id.* at 64-65.

239. *Id.* at 66.

240. JOHNSON, *supra* note 110, at 195; GEORGE MARTIN AND FRANCIS T. PLIMPTON, CAUSES AND CONFLICTS 248 (1997); Hilbink, *supra* note 213, at 66.

241. *Id.*

242. Harrison Tweed, Bernard G. Segal, and Herbert Packer, *Civil Rights and Civil Disobedience to Law*, in CIVIL DISOBEDIENCE 90, 90 (Hugo A. Bedau ed. 1969).

243. Hilbink, *supra* note 213, at 69 (citing Unsigned memo (likely Jack Pratt), “Request for Lawyers for Summer Work in Southern States,” (undated but circa 1964), Mississippi Summer Project 1964 (Apr.-June 1964) File, Box 40, LCCRUL Papers, Wesleyan University Library, Special Collections and Archives, Middletown, CT).

LCCRUL attorneys were limited to individual representation and were not to pursue impact litigation or other forms of advocacy.<sup>244</sup> Yet, as these lawyers witnessed the realities of segregation and massive resistance, they chafed at the restrictions. The most outspoken critics of LCCRUL's policies on lawyering were derided as "going SNCC," but in fact, many of these attorneys came to conclude that

their value [should be measured] not in terms of legal victories won or representation provided. Rather, lawyers saw their presence as the value. Their *presence*—in the streets, in COFO [Council of Federated Organizations] Freedom Houses, in jails, in courtrooms—played a role in deterring white Southerners, and particularly state actors, from meting out greater violence and lawlessness against the movement.<sup>245</sup>

Like other attorneys who subsequently identified as cause lawyers, these LCCRUL lawyers saw their place in social movements as distinct: Law was one among many tools for reform, lawyers had to collaborate with clients, and there was no bright line between law and politics.<sup>246</sup>

In the wake of the civil rights movement, other cause lawyers successfully employed a combination of litigation, lobbying, and grass-roots activism in the 1960s and 1970s, in part because they came to enjoy at least grudging recognition from the bar.<sup>247</sup> This acceptance was motivated by a "crisis of professionalism" prompted by the slow pace of desegregation, the skullduggery of high-ranking attorneys in the Nixon administration during the Watergate scandal, and strong opposition among rank-and-file bar members to creation of a national legal services program.<sup>248</sup> As historian Jerold S. Auerbach explains, these lapses in social responsibility made attorneys seem like nothing more than hired guns and left the ABA on the wrong side of history.<sup>249</sup> Faced with these pressing challenges, bar leaders recognized the importance to their professional standing of embracing law as an instrument of social reform.

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244. *Id.* at 67-68.

245. *Id.* at 77 (emphasis in original).

246. *Id.* at 71, 78.

247. SARAT & SCHEINGOLD, SOMETHING TO BELIEVE IN, *supra* note 28, at 4, 23, 25, 40. A high-water mark was a 1977 article in the New York Times Magazine by Judge Marvin Frankel, advocating publicly subsidized legal services for all of those in need as "a community universal service" that would be "an essential step toward our proclaimed goal of equal justice." Marvin E. Frankel, *An Immodest Proposal*, N.Y. TIMES, Dec. 4, 1977, at 92.

248. SARAT & SCHEINGOLD, SOMETHING TO BELIEVE IN, *supra* note 28, at 40-41, 49; JOHNSON, *supra* note 110, at 105-06.

249. AUERBACH, *supra* note 17, at 263.

*B. Legal Services: From the War on Poverty to the War on Lawyers*

To address growing cynicism about the legal profession's leadership and vision, ABA President Lewis Powell, Jr. worked in the mid-1960s to craft a compromise that would win support for the fledgling legal services program in the Office of Economic Opportunity (OEO).<sup>250</sup> Originally part of President Lyndon Baines Johnson's War on Poverty, OEO had been perceived as a threat to private legal aid societies as well as solo and small firm practices.<sup>251</sup> Powell addressed these fears by offering ABA support only if OEO permitted existing legal aid societies to receive government funding, allowed bar representatives to have a role in governance, and respected traditional norms of professionalism.<sup>252</sup> Powell's compromise made the independent judgment of lawyers non-negotiable, and professional autonomy became a hallmark of the ABA's subsequent support for legal services, even as the program confronted intense political backlash.<sup>253</sup>

Inherent contradictions in the understanding of the lawyer's professional role became evident. While the ABA insisted that lawyers be able to exercise independent judgment, critics decried legal services attorneys who pursued larger social agendas rather than subordinating themselves to their clients' immediate interests.<sup>254</sup> There were proposals to limit any class action litigation, legislative advocacy, or media campaign that was not done at the specific behest of a low-income client.<sup>255</sup> Other reforms called for restrictions on lawsuits against national, state, and local officials, suggesting that loyalty really ran to the government (which at the federal level was paying the bills), rather than to the poor.<sup>256</sup> The ABA's response was simple: legal services

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250. JOHNSON, *supra* note 110, at 72-75.

251. *Id.* at 69-71; JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 198 (2001); Abel, *Law Without Politics*, *supra* note 14, at 499.

252. JOHNSON, *supra* note 110, at 73-75; JEFFRIES, *supra* note 251, at 198-200.

253. See, e.g., JOHNSON, *supra* note 110, at 224, 264; EARL JOHNSON, JR., 2 TO ESTABLISH JUSTICE FOR ALL 353, 605-07 (2014).

254. Senator Orrin G. Hatch, *Myth and Reality at the Legal Services Corporation*, in ORRIN G. HATCH ET AL., LEGAL SERVICES CORPORATION: THE ROBBER BARONS OF THE POOR? 10 (1985) ('[T]he program is not merely a means for providing legal counsel, but more importantly a social movement. As a result, the goals of the movement take precedence over the needs of individual clients . . .'). As Scott Cummings notes, criticisms of activist lawyers' fidelity to clients came from the left as well as the right, even extending to the Inc. Fund's handling of desegregation litigation. Scott L. Cummings, *The Social Movement Turn in Law*, 42 LAW & SOC. INQUIRY 1, 3, 9 (2017).

255. JOHNSON, *supra* note 110, at 130; JOHNSON, *supra* note 253, at 527-28, 557, 574, 638-39; EARL JOHNSON, JR., 3 TO ESTABLISH JUSTICE FOR ALL 739, 758 (2014); Abel, *Law Without Politics*, *supra* note 14, at 531; William P. Quigley, *Legal Services: The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 257 n.101, 261-64 (1998).

256. JOHNSON, *supra* note 110, at 126, 233, 239-40; Quigley, *supra* note 255, at 258. See generally Abel, *Law Without Politics*, *supra* note 14, at 528 ('[o]ne of the most puzzling



attorneys must be free to represent low-income clients on the same terms as those who served paying clients.<sup>257</sup> But this response obscured underlying ambiguities about the lawyer's role. Some of these uncertainties related to whether social trusteeship should figure at all in the representation or whether lawyers should apply their expertise narrowly to do their clients' bidding. For those who did embrace social trusteeship, there were doubts about how broadly it should be construed and, in particular, whether it should encompass broad attacks on the structural conditions of poverty as well as the particular hardships it created for individual clients.

In part because of these ongoing uncertainties, the ABA could not deflect a divisive struggle over the proper reach of legal services.<sup>258</sup> At the outset, the legal services program was part of a comprehensive effort to eradicate poverty, and it seemed both logical and necessary that attorneys would pursue fundamental change. Later, though, when OEO was dismantled and legal services became an independent organization, its mission shifted to access to justice.<sup>259</sup> As then-President of the Legal Services Corporation Thomas Ehrlich explained, "legal assistance for the poor is no longer part of a war against poverty. Rather that assistance is established as a basic right of citizenship."<sup>260</sup> Due to limited funding, this right was framed as one of minimum access with an aspiration for adequate or even equal access at some unspecified later date.<sup>261</sup> That hope was never realized; instead, there were perennial debates about what the bare minimum of legal representation for indigent clients required.<sup>262</sup> The shift to an access to justice mission helped to cement a view of the program as one designed to meet client needs, and legal aid lawyers were banned from filing class actions to pursue broad-based reforms.<sup>263</sup> As a consequence, structural reform efforts had to find a

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aspects of the state's role in creating and administering legal aid is that often the state is the adversary of legal aid recipients.").

257. JOHNSON, *supra* note 110, at 224; JOHNSON, *supra* note 253, at 605-07.

258. JOHNSON, *supra* note 253, at 442-46; Abel, *Law Without Politics*, *supra* note 14, at 547.

259. JOHNSON, *supra* note 253, at 467-70.

260. H. Comm. on Appropriations, Subcomm. on Departments of State, Justice, Commerce, and the Judiciary Appropriations, Hearings on the Second Supplemental Appropriations Bill, 1976, 94th Cong. 87 (1976) (testimony of Thomas Ehrlich, President, Legal Services Corporation).

261. JOHNSON, *supra* note 253, at 469-70, 501-92; Abel, *Law Without Politics*, *supra* note 14, at 548; Quigley, *supra* note 255, at 257-61.

262. Edwin Meese, a high-ranking aide to President Ronald Reagan, offered one of the most minimalist interpretations when he asserted that demand for legal services among the poor could be met by relying entirely on law student volunteers. Abel, *Law Without Politics*, *supra* note 14, at 548.

263. JOHNSON, *supra* note 253, at 737-40; SARAT & SCHEINGOLD, SOMETHING TO BELIEVE IN, *supra* note 28, at 15. See also Michael McCann and Jeffrey Dudas, *Retrenchment*

home elsewhere in non-profit public interest law firms, small and solo firms, large firm pro bono programs, and government practice. Each of these practice environments influenced the nature of the lawyering: Often, those workplaces with the most resources pursued the least controversial cases, while those with the fewest resources struggled to support more radical conceptions of reform.<sup>264</sup> Increasing reliance on pro bono services, which eventually outpaced legal aid in meeting the needs of the poor, placed primary responsibility with private law firms and so further instantiated a traditional model of lawyering.<sup>265</sup>

Innovations during the first two ages of modern American lawyering proved quite durable, in part because they came to enjoy the support of institutional elites. Changes wrought by the third age, however, proved more vulnerable to retrenchment, in part because they reflected the efforts of outsiders who were profoundly marginalized. Attacks on legal aid began in earnest in the 1980s with the election of President Ronald Reagan.<sup>266</sup> His administration's ideological skirmishes were waged in the name of government downsizing and cost-cutting but often reflected a deep hostility to the redistributive consequences of structural reform. As the organized bar sought to assimilate legal services to conventional lawyering, the Reagan Administration's attacks on the program put the ABA on the defensive. In 1987, Clark Durant, then chair of the Legal Services Corporation board, created an uproar at an ABA mid-year meeting when he argued that legal services funding should be zeroed out because the entire legal profession needed to be restructured.<sup>267</sup> In Durant's view, the monopoly on legal services had to be broken by lifting restrictions on the unauthorized practice of law and by doing away with educational and licensing requirements for lawyers.<sup>268</sup> As he explained, "[t]he greatest barrier to widely dispersed low-cost dispute resolution services for the poor, and for all people, could very well be the laws protecting our

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... and Resurgence? *Mapping the Changing Context of Movement Lawyering in the United States*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 37, 38 (Austin Sarat & Stuart Scheingold eds. 2006) (describing difficulties for cause lawyering that arose in the 1980s).

264. See Scott Barclay and Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in *THE WORLDS CAUSE LAWYERS MAKE* 176-77 (Austin Sarat & Stuart Scheingold eds. 2005).

265. Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 18 (2004).

266. JOHNSON, *supra* note 253, at 505-08. Reagan's animosity toward the legal services program began when he was governor of California and repeatedly tried to eliminate California Rural Legal Assistance in response to complaints from wealthy donors in agribusiness. *Id.* at 121-38.

267. *Id.* at 615.

268. *Id.*

profession.”<sup>269</sup> To break up cartel-like practices, Durant urged “a private sector deregulated legal profession” that would “encourage at every turn the ability of entrepreneurs, para-professionals and lay people to be a part of the delivery of legal services to the poor and for all people.”<sup>270</sup> This open attack on the profession’s identity prompted a sharp rebuke from the ABA, which called for Durant’s resignation as board chair.<sup>271</sup>

In contrast to populist reforms advocated during the Jacksonian era, Durant’s proposals were the product of elite resistance to cause lawyering. In the end, a combination of conservative political ascendancy and powerful market forces took a toll on the alliance between the practicing bar and progressive cause lawyers. According to socio-legal scholars Stuart Scheingold and Austin Sarat,

As the broader political culture became more conservative after 1980, as the market for legal services became more competitive, and as moral advocacy lost its luster for most young lawyers, the profession’s receptivity to cause lawyering diminished. At the level of the firm, . . . bottom-line concerns eroded support for cause lawyering, with its tendency to eat into billable hours and sap the energies of young associates. As for the organized profession, it continued to call for vigorous pro bono programs and to support government-funded legal services.<sup>272</sup>

Bar leaders’ exhortations at best produced mixed results. Legal services suffered severe setbacks, and firms implemented their pro bono programs in ways that deflected the most radical implications of cause lawyering.<sup>273</sup>

Efforts to dismantle legal services represented a frontal assault on cause lawyering. More subtle were efforts to appropriate lawyering innovations to advance conservative causes. As legal scholar Ann Southworth notes, “in the late 1960s, the public interest movement was almost synonymous with left legal activism. . . .”<sup>274</sup> By the 1970s, however, right-wing legal groups had begun to emerge and found themselves “at war” over goals and strategies; indeed, the infighting prompted the conservative Heritage Foundation to intervene and counsel cooperation.<sup>275</sup> In the late 1970s, attorney Michael Horowitz obtained

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269. *Id.*

270. *Id.*

271. *Id.* at 616-18.

272. SARAT & SCHEINGOLD, SOMETHING TO BELIEVE IN, *supra* note 28, at 44.

273. *Id.* at 44-45; *see also* Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PROF. 209, 222-25 (1998) (law firm culture can undermine the transformative potential of pro bono practice).

274. ANN SOUTHWORTH, LAWYERS OF THE RIGHT 32 (2008) (footnote omitted).

275. *Id.* at 31.

funding to study conservative legal advocacy organizations. He found that “what is at stake in public interest law is not so much a battle over cases won and lost as of ideas and ideologies.”<sup>276</sup> Horowitz concluded that for right-wing legal organizations to become an authentic movement, they had to demonstrate that “the real interests of America’s poor and vulnerable inhere in such goals as abatement of inflation, enhanced economic productivity, restraint on the power of government and the courts, and growth of such ‘middle class’ values as the work ethic, education, [and] effective criminal prosecution . . . .”<sup>277</sup> To that end, he urged these organizations to recruit talented young attorneys and to abandon their narrow focus on litigation and amicus briefs. In particular, he exhorted the groups to seek influence in the policy process, both in the legislative and executive arenas.<sup>278</sup> Ironically, these broad tools for effecting social change were the very ones that the Reagan administration had sought to strip from legal aid lawyers.

Reagan’s presidency ushered in a proliferation of conservative advocacy groups, which enjoyed a newfound receptivity in the highest circles of government.<sup>279</sup> That growth continued into the 2000s.<sup>280</sup> Though meant to appropriate the public interest rhetoric of the left, the rise of conservative legal advocacy organizations also complicated notions of professionalism. Legal scholars Stuart Scheingold and Austin Sarat have argued that “[t]he place of cause lawyering in the profession remain[ed] conditional and precarious” because it “directly assail[ed] the profession’s core standard of ethical behavior, which weds lawyering to political and moral neutrality and to technical competence.”<sup>281</sup> The emergence of robust conservative legal organizations arguably showed that even the lawyering innovations of the civil rights movement could be treated as a refinement of expertise in the service of clients’ interests. With cause lawyers on both the left and the right, lawyering itself remained a neutral concept—equally available to advance competing ideologies. This neutrality in turn revealed the underlying incoherence of social trustee professionalism as the notion of the public good became fodder for an increasingly partisan adversarial process.<sup>282</sup>

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276. *Id.* at 19 (citing Michael Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms* (1980)).

277. *Id.* at 19-20 (citing Horowitz, *supra* note 276).

278. *Id.*

279. *Id.* at 23-25.

280. SOUTHWORTH, *supra* note 274, at 29-30.

281. SARAT & SCHEINGOLD, *SOMETHING TO BELIEVE IN*, *supra* note 28, at 23, 25.

282. Russell Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 *GEO. J. LEGAL ETHICS* 601, 608 (2016) (“In the 1960s, both the left and the right discredited the possibility of disinterested expertise. They asserted that the public good did not exist. All

*C. Making It Real: Cause Lawyering and the Growth of Clinical Education*

The legal academy played a significant role in the third age of modern American lawyering. The Inc. Fund had worked closely with Howard Law School, especially its dean Charles Hamilton Houston, to develop a litigation strategy that would dismantle the “separate but equal” doctrine. Houston was a seminal figure who devised plans of legal attack, mentored protégés to lead the effort, and designed a curriculum to prepare graduates for the rigors of practice. As one of the few black students at Harvard Law School, Houston used his experience with the educational octopus to inform his deanship at Howard.<sup>283</sup> African-Americans were largely barred from elite white law schools, but Houston believed that historically black law schools with high expectations and excellent training could prepare students for effective advocacy on behalf of their communities.<sup>284</sup> As he explained, “There are enough white lawyers to care for the ordinary legal business of the country if that were all that was involved. But experience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes.”<sup>285</sup>

In the 1930s Houston worked to turn Howard Law School into a challenging academic institution like Harvard. There would no longer be a part-time night school, and the day program would raise admissions standards, strengthen the curriculum, and make more demands on the faculty.<sup>286</sup> By 1950, Houston had achieved many of his ambitious goals and was training a substantial portion of the black lawyers in the United States. A number of these alumni worked as affiliates or employees of the Inc. Fund.<sup>287</sup> Thurgood Marshall, a Houston protégé who became a

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was self-interest; pretensions to the public good only masked financial and political self-interest.”).

283. Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 MERCER L. REV. 631, 635-36 (2001).

284. See generally J. Clay Smith, *Toward a Houstonian Jurisprudence and the Study of Pure Legal Existence—In Memoriam of Frank D. Reeves*, 18 HOWARD L.J. 1 (1974) (describing “Houstonian Jurisprudence”); Ware, *supra* note 283, at 636-38 (same).

285. Charles Hamilton Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 49 (1935).

286. Ware, *supra* note 283, at 635-36; Okianer Christian Dark, *The Role of Howard University School of Law in Brown v. Board of Education*, 16 WASH. HIST. 83 (2004-05). Indeed, some critics described Houston’s decision to close Howard’s part-time evening law program as part of a misguided attempt to “Harvardize.” GENNA RAE MCNEIL, *GROUNDWORK* 74 (1983).

287. J. CLAY SMITH, JR., *EMANCIPATION 1844-1944* at 64 (1993); Dark, *supra* note 286, at 84. Among the leading civil rights lawyers who challenged segregation at the Inc. Fund were Howard Law School alumni Thurgood Marshall, Robert Carter, Spottswood W. Robinson III, and George E.C. Hayes. Behring Center, Smithsonian National Museum of

prominent civil rights litigator and a justice of the United States Supreme Court, recalled: “When *Brown* against the Board of Education was being argued in the Supreme Court . . . [t]here were some two dozen lawyers on the side of the Negroes fighting for their schools . . . . [O]f those . . . lawyers . . . only two hadn’t been touched by Charlie Houston. . . .”<sup>288</sup>

As part of the effort to elevate Howard, Houston asked law faculty to lead by example. He recruited active civil rights practitioners who brought their practical experience into the classroom. In Houston’s own courses, he drew on materials from the American Civil Liberties Union (ACLU) as well as the NAACP so that students would understand the challenges of broad-ranging reform advocacy.<sup>289</sup> Designed to address the needs of black lawyers, the curriculum reflected “a difference in emphasis with more concentration on the subjects having direct application to the economic, political and social problems of the Negro.”<sup>290</sup> In addition to a civil rights focus, Howard’s course offerings relied on practical exercises to train students in everything from drafting real estate documents to working in the criminal justice system.<sup>291</sup> Top students like Marshall even had opportunities to participate in cases that the Inc. Fund was litigating.<sup>292</sup> This intensive hands-on instruction was designed to enable Howard Law alumni to overcome limited opportunities for professional development as well as the pitfalls of discrimination.

Innovation associated with the third age of modern American lawyering led to lasting change with the growth of clinical education.<sup>293</sup> Demands for more practical training in law school were hardly new. In 1928, Alfred Z. Reed recommended such courses to little avail.<sup>294</sup> During the New Deal, Jerome Frank pressed for real-life legal laboratories, but his efforts also gained little traction.<sup>295</sup> In fact, by 1951 there were only twenty-eight law school clinics in the United States.<sup>296</sup>

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American History, *Separate Is Not Equal: Brown v. Board of Education—The Challenges of Segregation*, <http://www.americanhistory.si.edu/brown/history/5-decision/challengers.html>.

288. MCNEIL, *supra* note 286, at 3 (citing *College Honors Charles Houston ‘15*, AMHERST MAG., Spring 1978, at 12, 14).

289. Robert K. Poch, *Shaping Freedom’s Course: Charles Hamilton Houston, Howard University, and Legal Instruction on U.S. Civil Rights*, 39 AM. EDUC. HIST. J. 417, 421 (2012). Eventually, Houston left Howard to become part of the Inc. Fund’s litigation team, though he did not live to see the victory in *Brown*. *Id.* at 417. See generally RAWN JAMES, JR., ROOT AND BRANCH 47-58 (2010) (describing Houston’s influence on Marshall).

290. Houston, *supra* note 285, at 51.

291. Poch, *supra* note 289, at 422-24.

292. *Id.* at 426-27.

293. JOHNSON, *supra* note 110, at 441-42.

294. Alfred Zantlinger Reed, *Present-Day Law Schools in the United States and Canada*, *Bulletin No. 21*, at 215-21 (1928).

295. See *supra* notes 207-10 and accompanying text.

296. Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535 (1951).

From the outset, the rationale for experiential learning was far from monolithic. Reed had envisioned a two-track system that relegated the practically trained to mundane careers. Clinics would promote the mastery of expertise that could be sold on the market; there was no notion that skills training should advance social change. By contrast, “for the greats of Realism, practical training was primarily for the purpose of deepening theoretical understanding.”<sup>297</sup> Realists believed that students need[ed] to be exposed to the ‘law in action’ in order to become sensitive to the impact of the law on the world and the impact of the world on law, so that they would reflect on their own future roles and not view law as a self-contained ‘science’ divorced from reality.”<sup>298</sup> Reflecting an expansive concept of social trustee professionalism, clinics would teach students that “an important part of their future task is to press for improvements of the judicial process and for social and economic changes through legislation, and wise administration . . . .”<sup>299</sup>

With a strong social justice focus, the model of clinical education that initially emerged during the third age of modern American lawyering owed more to the Realists’ vision than Reed’s.<sup>300</sup> Early on, the OEO itself had recognized the potential for legal educators to become partners in the War on Poverty. Officials sought funding to link legal aid attorneys to law schools so that advocacy for the poor could be supported by high-quality research and well-trained attorneys.<sup>301</sup> This partnership was never realized; instead, some post-graduate fellowships were created to encourage young lawyers to work for legal services.<sup>302</sup> Even a grant to support the Harvard Legal Services Institute, a single initiative at a single law school, met with withering criticism and federal funding was terminated.<sup>303</sup>

Without public funding, law school clinics relied on private seed money from the Ford Foundation to expand. Ford appointed William Pincus to head the Council on Legal Education for Professional

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297. George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 171 (1974).

298. *Id.*

299. Frank, *supra* note 207, at 922.

300. Grossman, *supra* note 297, at 173-74; Dennis E. Curtis, *Educating Lawyers: Clinical Programs and the Legal Profession*, Remarks to the Conference on Clinical Education in the World, Waseda Law School, Sept. 9, 2006, at 12-13; Menkel-Meadow, *supra* note 78, at 577.

301. JOHNSON, *supra* note 110, at 198 (describing 1969 National Justice Foundation proposal).

302. The Reginald Heber Smith Fellows (or “Reggies”) program was created in 1966-67 and lasted for 16 years. During that time, it trained 2,300 poverty lawyers. *Id.* at 118-20, 148-49.

303. JOHNSON, *supra* note 110, at 492-93.

Responsibility (CLEPR), a post he held from 1968 to 1981.<sup>304</sup> These efforts were transformative: By the early 1970s half of all American law schools had at least one clinical program.<sup>305</sup> In explaining this dramatic shift, Pincus described himself as “a child of the Roosevelt era”<sup>306</sup> who recognized the importance of a new era of social activism. In his view, “[t]he outside forces which helped CLEPR’s program and served also to open the law schools to change included the black man’s fight for advancement; various kinds of student action; and the legal services programs which came as a result of the war on poverty.”<sup>307</sup> He believed that “[l]aw student unrest in the late 60’s, . . . minor as it was compared to the other student unrest, found the law faculties shaky enough to be ready to make some concessions.”<sup>308</sup> As a result, law school clinics emerged from “a marriage of convenience between law schools, a vanguard of law students and young law professors, and CLEPR.”<sup>309</sup> Pincus was not always entirely comfortable with the union. When invited to be part of a discussion on “Young Lawyers and the Legal Revolution,” he remarked that “I doubt that what we at the Council on Legal Education for Professional Responsibility are trying to bring about can be termed a revolution. We are trying to reform the law school curriculum. . . .”<sup>310</sup>

In its early years, CLEPR “justified clinical education in terms of community service.”<sup>311</sup> This orientation led to concerns that the educational mission was being shortchanged.<sup>312</sup> In a May 1971 report, CLEPR acknowledged the tensions:

It was felt that if clinical programs continue to restrict themselves to small numbers of students, they are likely to court the disapproval of the outside world particularly as they involve themselves in highly sensitive cases. If the entire student body of the law school is

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304. J.P. “Sandy” Ogilvy, *William Pincus: A Life in Service—Government, Philanthropy & Legal Education*, 10 U. MASS. L. REV. 8, 10 (2015). In the late 1950s and 1960s, Pincus worked on two projects that laid the foundation for CLEPR: the National Council on Legal Clinics and the Council on Education for Professional Responsibility. *Id.* at 36-37, 42-45.

305. William Pincus, *The President’s Report*, in WILLIAM PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS 27-28 (1980); William Pincus, *To Make Legal Education More Practical*, in PINCUS, *supra* at 117, 118; William Pincus, *Concepts of Justice and of Legal Education Today*, in PINCUS, *supra* at 125, 132; William Pincus, *Changing Today’s Law Schools*, in PINCUS, *supra* at 181-82; William Pincus, *Clinical Legal Education in the United States, 1968-1975*, in PINCUS, *supra* at 343-44. See generally STEVENS, *supra* note 42, at 215-16; Spencer, *supra* note 80, at 2004-05.

306. Ogilvy, *supra* note 304, at 35 (citing June 7, 2000 interview with William Pincus).

307. Pincus, *Changing Today’s Law Schools*, in PINCUS, *supra* note 305, at 188.

308. Pincus, *Legal Clinics in Law Schools*, in PINCUS, *supra* note 305, at 249.

309. *Id.* at 241, 249-50.

310. Pincus, *To Make Legal Education More Practical*, in PINCUS, *supra* note 305, at 117.

311. Grossman, *supra* note 297, at 174.

312. *Id.* at 176.



involved, then descriptions in terms of ‘educational’ rather than ‘agitational’ are more likely to be applied.<sup>313</sup>

These tensions led to competing approaches—ranging from partnerships with legal aid offices and live-client clinics that fulfilled a social justice mission to field placements and simulations that focused on skills training as preparation for practice.<sup>314</sup>

The conflict eventually was resolved largely in favor of skills training. By 1974, George S. Grossman, who conducted research on clinical programs for CLEPR, concluded that “[a] new consensus is emerging, basing the rationale of the clinical method not on service, not on law reform, not on research results, but on education.”<sup>315</sup> The personal experience of clinicians confirmed this shift. Professors Philip G. Schrag and Michael Meltsner arrived at Columbia Law School as clinics were being “born in the social ferment of the 1960s.”<sup>316</sup> Initially, their clinical offerings were designed to address questions of social justice but as the civil rights and antiwar protests of an earlier era faded into distant memories, students were “quite content with the view that social issues—particularly questions of income and wealth distribution—are personal concerns, unrelated to their career decisions within the profession. . . .”<sup>317</sup> In response, their clinics gradually came to focus on skills training, and Schrag and Meltsner dropped subjects like criminal justice reform, campaign practices, and immigration, instead creating simulations that were more manageable and easier to teach.<sup>318</sup> The changes eventually aligned clinical instruction more closely with traditional notions of lawyering. As Schrag and Meltsner explain, “[t]he comparative neutrality of our present role tend[ed] to convey an approval of good lawyering divorced from its social impact. . . .”<sup>319</sup> Despite this shift, they still believed that their pioneering efforts made “[l]aw schools . . . generally more hospitable places for

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313. Council on Legal Education for Professional Responsibility, *Clinical Education—What Is It? Where Are We? Where Do We Go From Here?*, 16 STUDENT L.J. 16, 17 (May 1971).

314. George Grossman, *supra* note 297, at 173-81, 184-86.

315. *Id.* at 186.

316. PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL EDUCATION 3 (1998).

317. *Id.* at 16.

318. *Id.* at 10, 56-58. For a description of the competing theories underlying clinical education as well as an account of the strong orientation toward structural reform and social justice among pioneering clinicians like Gary Bellow, see Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555, 570-71 (1980). In the midst of the debates over clinical education, a seminal 1977 text by David Binder and Susan Price helped to cement a shift from live-client clinics towards other forms of skills training. Robert D. Dinerstein, *Review Essay: Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 698, 700 (1992).

319. SCHRAG & MELTSNER, *supra* note 316, at 57-58.

teachers and students interested in law reform and social service than they were when we started teaching more than twenty-five years ago.”<sup>320</sup>

Just as the third age’s innovation of cause lawyering proved unstable and subject to retrenchment, so too did clinical education with a social justice orientation. According to legal scholar William Simon, as skills training became narrowly focused on the client’s interests, it was shorn of historical and social context. This seeming neutrality cultivated “a sense of apolitical moral engagement” that celebrates “an ahistorical and apolitical conception of human nature.”<sup>321</sup> More recently, clinician Sameer Ashar has voiced similar concerns about the lost democratic promise of clinical education.<sup>322</sup> In his view, even live-client clinics now rely heavily on an individual case-centered model, which reinforces conventional practice norms.<sup>323</sup> Ashar believes that law schools have come to privilege pedagogy over social justice by marginalizing community-based, progressive lawyering.<sup>324</sup> With the latest economic downturn in the legal market, he argues, there are increasing pressures to prepare students for traditional legal careers.<sup>325</sup> As a result, clinical lawyering for social justice has been forced to cede even more curricular space to practical training.<sup>326</sup> Rather than transforming the traditional curriculum, then, clinical education has itself been assimilated to conventional pedagogies.

*D. Desegregation, Affirmative Action, and the Compromised Pedagogy of Diversity*

Calls for social justice in law schools affected not just the curriculum but the composition of the student body: women and people of color enrolled in unprecedented numbers beginning in the late 1960s and 1970s. As early as 1938, NAACP lawyers had successfully challenged policies that excluded blacks from public law schools.<sup>327</sup> In *Sweatt v. Painter*,<sup>328</sup> decided just a few years before *Brown*, the Supreme

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320. *Id.* at 315.

321. William Simon, *Homo Psychologicus: Notes for a New Legal Formalism*, 32 STAN. L. REV. 487, 554 (1980).

322. Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201, 204-05, 208-12 (2016); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 357-58 (2008).

323. Ashar, *Law Clinics and Collective Mobilization*, *supra* note 322, at 357-58, 368-71.

324. *Id.* at 389-97; Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1078 (2007).

325. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, *supra* note 322, at 208-09.

326. *Id.* at 112-14.

327. *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337, 352 (1938) (program that paid black students to attend a law school in another state violated equal protection).

328. *Sweatt v. Painter*, 339 U.S. 629 (1950).

Court struck down Texas's establishment of a separate and clearly inferior law school for African-American students. At the time that *Sweatt* was decided, African Americans accounted for only about .65 percent of the legal profession, and segregation was the norm, not the exception, in legal education.<sup>329</sup> The opinion in *Sweatt* acknowledged these stark realities, noting that "[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts."<sup>330</sup>

Despite the victory in *Sweatt*, law schools remained overwhelmingly white until the late 1960s.<sup>331</sup> In the 1964-65 academic year, for example, only 1.3 percent of law students were African-American, and that figure fell to less than one percent after excluding students enrolled at historically black institutions.<sup>332</sup> The data for Latinos is sketchier; however, research suggests that by 1969, fewer than .006 percent of all law students were part of an "amorphous category entitled Spanish American, which includes all Spanish surnames and Spanish speaking groups."<sup>333</sup> The statistics on Native Americans are similarly scant, but in 1968, there were no more than twenty-five Native American attorneys in the United States.<sup>334</sup> In part, this slow progress reflected a philosophy of gradualism in implementing desegregation. In 1955, for example, the AALS rejected the Committee on Racial Discrimination's recommendation that law schools refrain from discriminating against black applicants or lose their membership.<sup>335</sup> AALS leaders concluded that "any coercive measures would delay further racial integration in the schools by aggravating present resentment and resistance" and therefore "[t]he wisest course . . . is for the Association to continue to serve in the role of mediator . . . ."<sup>336</sup>

The rise of cause lawyering made plain the gap between the identities of lawyers and members of the communities that they served. When the War on Poverty was launched, the scarcity of lawyers of color was so acute that officials at OEO's legal services program worried about "funding a nearly all-white program."<sup>337</sup> To address that concern,

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329. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 6 (2003).

330. *Sweatt*, 339 U.S. at 634.

331. Kidder, *supra* note 329, at 4-10.

332. *Id.* at 6-7.

333. Cruz Reynoso et al., *La Raza, the Law, and the Law Schools*, 2 U. TOL. L. REV. 809, 839 (1970).

334. Kidder, *supra* note 329, at 8.

335. Maurice T. Van Hecke, *Racial Desegregation in the Law Schools*, 9 J. LEGAL EDUC. 283, 283 (1956).

336. *Id.* at 288.

337. JOHNSON, *supra* note 110, at 188.

OEO lawyers helped to launch the Council on Legal Educational Opportunity (CLEO), an initiative of the ABA, the AALS, and the historically black National Bar Association. Funded by the Ford Foundation, CLEO was a pipeline program designed to help talented students of color pursue law degrees.<sup>338</sup> Affirmative action programs, created in response to riots in 1967 and 1968 that followed the assassination of civil rights leader Dr. Martin Luther King, Jr.,<sup>339</sup> produced substantial gains in law school enrollment for blacks, Latinos, and Native Americans, especially in the 1970s.<sup>340</sup> During that period, women also entered law schools in unparalleled numbers, despite some initial resistance.<sup>341</sup> In 1965, female students made up four percent of enrollments, but by 1980, they accounted for thirty-six percent of all law students.<sup>342</sup>

With this remarkable demographic shift, some legal educators anticipated that diversity itself would transform classroom dynamics so that questions of inequality and inclusion could come to the fore. That notion had figured in *Sweatt*'s assertion that law schools were less effective when isolated from the communities they serve. A similar philosophy influenced the United States Supreme Court's endorsement of affirmative action programs in 1978 in *Bakke v. Regents of the University of California*.<sup>343</sup> There, Justice Lewis Powell emphasized that student body diversity was critical to promote "the robust exchange of ideas."<sup>344</sup> In 2003, the United States Supreme Court reaffirmed this view in *Grutter v. Bollinger*,<sup>345</sup> when it upheld the consideration of race and ethnicity in admissions at the University of Michigan Law School. The Court saw elite law schools as pathways to influence that must be open to people from all walks of life. A diverse student body would

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338. *Id.* at 188-92.

339. Kidder, *supra* note 329, at 12.

340. *Id.* at 13. For a thorough description of changes in diversity at one American law school during this period, see MIGUEL ESPINOZA, *THE INTEGRATION OF THE UCLA SCHOOL OF LAW, 1966-1978: ARCHITECTS OF AFFIRMATIVE ACTION* (2018).

341. Kidder, *supra* note 329, at 15-17. Some law schools had quotas for female students, and women were not admitted to all accredited law schools until 1972. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1173-74 (1988). Acceptance of women could be grudging. When Harvard admitted its first women law students in 1950, Dean Erwin Griswold reportedly greeted the incoming class by saying "Enjoy your stay at Harvard Law School, and as for the women in the class, personally, I didn't favor your admission, but since you are here, welcome." John Anderson, *Admission Denied*, AM. LAW., Mar. 1999, at 118, 119.

342. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, ABA AND LAW SCHOOL ADMISSION COUNCIL 808 (Wendy Margolis et al. eds. 2001). By 2000, women had achieved parity in law school enrollments. *Id.*

343. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J., majority).

344. *Id.* at 312 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

345. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

enrich the intellectual environment by better preparing all students to serve clients, understand the profession's public-regarding obligations, and assume leadership roles in a multicultural society.<sup>346</sup> In 2016, in *Fisher v. Texas*, the justices again embraced a pedagogy of diversity as a justification for affirmative action.<sup>347</sup>

Despite the Court's pronouncements, survey research and anecdotal evidence suggest that members of underrepresented racial and ethnic groups often are marginalized in classes that elevate technical doctrine over values rooted in personal experience. As legal scholar Elizabeth Mertz found in her study of first-year Contracts classes, the case method's dominance has led to a "constant filtering of conflict stories through the lens of legal-textual authority" and has taught students to acquiesce in the ways that legal discourse "operate[s] to reinforce social inequality, while essentially hiding its own tracks."<sup>348</sup> Even today, the Langdellian method socializes law students to treat as unnameable or at least irrelevant the very differences that diversity is designed to illuminate.

Women and people of color often feel alienated by the law school curriculum, as demonstrated by consistent findings that they are less likely to speak in class than their white male peers.<sup>349</sup> Researchers attribute these differences not only to traditional teaching methods in the first-year curriculum but also a significant lack of diversity on law school faculties and in the student body.<sup>350</sup> Typically, only a handful of upper-division electives concentrate on the unique experiences of women and people of color, while the rest of the curriculum remains largely free of

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346. *Id.* at 328-33.

347. *Fisher v. Texas* (*Fisher I*), 133 S. Ct. 2411, 2417-18 (2013); *Fisher v. Texas* (*Fisher II*), 136 S. Ct. 2198, 2210-11 (2016) (*Fisher II*).

348. MERTZ, *supra* note 78, at 94, 98 (2007); *see also* ROBERT GRANFIELD, MAKING ELITE LAWYERS 52-65 (1992) (students shift from idealism to cynicism because of the first-year curriculum's gamesmanship).

349. *See, e.g.*, Nancy E. Dowd, Kenneth B. Nunn, & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11, 22, 23, 26, 34 (2003); LANI GUINIER, ET AL., BECOMING GENTLEMEN 43 (1997); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 28-29 (1990); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1335 (1988). *But cf.* *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1242-43 (1988) (women participated less in class than men, but this pattern did not affect their satisfaction with or performance in law school). *See generally* Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 16-32 (1998) (reviewing studies on race and gender in the classroom).

350. *See, e.g.*, GUINIER ET AL., *supra* note 349, at 48, 49-51, 53-54, 58-62; Dowd, Nunn, and Pendergast, *supra* note 349, at 30-33, 36-39; Mertz et al., *supra* note 349, at 3-4; Homer & Schwartz, *supra* note 349, at 37-38, 45.

discussions of race and gender.<sup>351</sup> Despite these shortcomings, law students overwhelmingly endorse the value of diversity in legal education. In a study done at Harvard and Michigan shortly before the *Grutter* decision, education scholars Gary Orfield and Dean Whitla reported that approximately eighty percent of surveyed law students supported strengthening or maintaining admissions policies to promote inclusion of underrepresented minorities.<sup>352</sup> Students reported that contact with people of different races and ethnicities enhanced their ability to work in interracial settings, improved the educational experience, and prompted them to rethink their values and perspectives on issues like civil rights and criminal justice.<sup>353</sup>

The third age of modern American lawyering once again failed to grapple with the implications for social trusteeship of a major innovation in practice, cause lawyering. The bar wanted to preserve a unified image, but this time, the threat came from newly prominent black lawyers who had once been barred from joining the ABA. Their segregated status was undeniable proof of the profession's stratification, and this reality was harder to deflect through largely rhetorical commitments to social trusteeship. Initially, the NAACP's law-centric credo offered at least some common ground—all could agree that technical mastery was essential to consummate lawyering. Yet, even this shared understanding rooted in expert professionalism was destabilized by activists who insisted on political mobilization as a vital tool for reform. To restore some tenuous sense of professional solidarity, the bar turned to legal aid services and demanded that attorneys representing the poor enjoy the same autonomy as those serving paying clients. This move helped to legitimate a conventional model of legal service delivery, even as federal officials stripped legal aid attorneys of their most compelling techniques for effecting social change. The emphasis was on deploying expertise to serve client interests, while obligations to serve the greater good remained peripheral and ill-defined.

Conventional notions of mastery and expertise also worked to temper the impact of cause lawyering on American law schools. Clinical education was adapted to provide practical skills training, rather than to promote a social justice mission. Similarly, diversity became a means to prepare students to represent clients and deal with colleagues in a multicultural society, not an opportunity to reassess the social and ethical obligations of a changed profession. In short, expert professionalism

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351. Faisal Bhabha, *Toward a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 86-90 (2014).

352. Gary Orfield and Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in *DIVERSITY CHALLENGED* 147 (G. Orfield ed. 2001).

353. *Id.* at 155-67.

continued to anchor the bar's unified identity and to tether the evolution of social trustee professionalism. These repeated failures to elaborate the public-regarding aspects of law set the stage for the current crisis in the legal profession and legal education, one marked by fears of destructive market forces and declining aspirational ideals.

#### IV. THE CURRENT CRISIS: ARE WE ENTERING THE FOURTH AGE OF MODERN AMERICAN LAWYERING?

As the social activism of the 1960s and 1970s receded and anxieties about commercialism grew, an elegiacal literature on the decline of law as a public-regarding profession—always with at least some hope of redemption—began to appear. In his 1993 book *The Lost Lawyer*, former Yale Law School dean Anthony T. Kronman described a crisis of morale due to “the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well.”<sup>354</sup> In a similar vein, Robert MacCrate, a New York law firm partner and a strong proponent of skills training, decried pressures to commercialize practice, wondering whether “there is a place for a profession of law in what has been called, since the 1980s, the ‘legal services industry.’”<sup>355</sup> Both Kronman and MacCrate concluded that economic restructuring, particularly in large law firms, had made it harder for attorneys to live up to aspirations of service.<sup>356</sup> Each believed that legal education could play a pivotal role in restoring norms of social trustee professionalism.<sup>357</sup> Even so, Kronman struck a deeply pessimistic note, concluding that “the likelihood that the profession as a whole will awaken to the emptiness of its condition and there will be a great resurgence of support, at an institutional level, for the vanishing ideal of the lawyer-statesman seems . . . quite low.”<sup>358</sup>

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354. ANTHONY T. KRONMAN, *THE LOST LAWYER* 2 (1993). The invocation of “an older set of values” could be nostalgic. Worries about lost virtue and commercialized law practice have plagued large law firms since their inception. See Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 908 (1994).

355. Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 812 (2004).

356. *Id.* at 813-14; KRONMAN, *supra* note 354, at 273-307.

357. See MacCrate, *supra* note 355, at 812-15, 821-24; KRONMAN, *supra* note 354, at 269-70.

358. KRONMAN, *supra* note 354, at 380.

*A. A Profession Under Stress and the Prospect of a Fourth Age of Modern American Lawyering*

The contemporary crisis confronting the legal profession and legal education seems to confirm this gloomy assessment. When the *American Lawyer* began to track “profits per partner” in large firms in 1985, it reinforced perceptions of corporate attorneys as locked in a ruthless race for revenue.<sup>359</sup> The large firm mantra that “law is a business” has intensified as powerful corporate clients demand cost-cutting measures and take legal work in-house to save money.<sup>360</sup> In this highly competitive environment, there are concerns that large law firms will shirk their social obligations, including pro bono work.<sup>361</sup> Meanwhile, faced with narrowing profit margins, solo and small-firm practitioners also find it increasingly difficult to provide service to the needy.<sup>362</sup> Even public interest attorneys, confronted with funding cuts and constraints on their discretion, have sometimes come to view public-regarding obligations as inhering not in their work but in their self-sacrificing personal characters.<sup>363</sup>

As a result of these market changes, the organized bar has been grappling with intensifying stratification and fragmentation among practicing lawyers. Between 1967 and 2010, the earnings gap between a law partner and a solo practitioner nearly tripled, according to Internal Revenue Service data on lawyer earnings.<sup>364</sup> As large firm partners reaped unprecedented financial rewards, attorneys in public interest often earned incomes akin to those of social workers.<sup>365</sup> Stratification

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359. See BARTON, *supra* note 29, at 62-63, 70-71; MILTON REGAN & LISA ROHRER, LAW SCHOOL ADMISSION COUNCIL, A FRAGILE BALANCE: BUSINESS, PROFESSION, AND CULTURE IN THE LARGE LAW FIRM 14-17 (Oct. 2015); Dan Lear, “*I Hate to Break it to You Lawyers, But Law Is a Business*,” 5(3) GP SOLO EREPORT (Oct. 2015), [http://www.americanbar.org/publications/gpsolo\\_ereport/2015/lawyers\\_law\\_is\\_business.html](http://www.americanbar.org/publications/gpsolo_ereport/2015/lawyers_law_is_business.html).

360. BARTON, *supra* note 29, at 71-72.

361. See DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 54 (2015) (describing buy-out option for pro bono service); Douglas Thomson, *Negotiating Cause Lawyering Potential in the Early Years of Corporate Practice*, in THE WORLDS THAT CAUSE LAWYERS MAKE, 274, 293-97 (Austin Sarat & Stuart A. Scheingold eds. 2005) (law firms constrain pro bono practice and use it to reap benefits in training, reputation, and visibility).

362. See BARTON, *supra* note 29, at 102, 121-29; Heinz, Nelson, and Laumann, *supra* note 43, at 339-42.

363. See Lynn C. Jones, *Exploring the Sources of Cause and Career Correspondence Among Cause Lawyers*, in THE WORLDS THAT CAUSE LAWYERS MAKE 203, 219-20, 223-24 (Austin Sarat & Stuart A. Scheingold eds., 2005) (describing tensions between professional identity and activist identity for cause lawyers).

364. BARTON, *supra* note 29, at 47.

365. See, e.g., Richard L. Abel, *Choosing, Nurturing, Training, and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563, 1568 (2002); Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 433-34 (2017); Jennifer Smith, *Lawyer Salary Update: Class Warfare Edition*, WALL ST. J., Oct. 18, 2012; *Huge Gap*



led to fragmentation: lawyers in corporate firms rarely interacted with attorneys in other sectors of practice. Instead, BigLaw attorneys mainly dealt with business clients and other corporate lawyers from around the world.<sup>366</sup> Although the organized bar remains committed to a unified image of the profession, fragmentation has affected practitioners' willingness to commit time and energy to any professional organization.<sup>367</sup> ABA membership has steadily declined,<sup>368</sup> and niche bar associations now cater to the interests of particular constituencies.<sup>369</sup> Cause lawyers often see the National Lawyers Guild as more relevant to their professional lives,<sup>370</sup> and government lawyers have created their own organizations.<sup>371</sup> With growing diversity, identity-based bar associations have proliferated as well.<sup>372</sup> As a result, any unified notion of professional identity is under considerable strain.<sup>373</sup>

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*Remains Between Public Interest and Law Firm Attorney Salaries*, NALP Reports, NAT. JURIST, Sept. 15, 2010; Philip G. Schrag, Georgetown Univ. Law Ctr., Inaugural Lecture of the Delaney Family Professorship: Why Would Anyone Want to Be a Public Interest Lawyer? (Sept. 23, 2009), at 2.

366. See BARTON, *supra* note 29, at 173-76.

367. See Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in CAUSE LAWYERING 139-40 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Scheingold, *The Struggle to Politicize Legal Practice*] (time constraints prevent lawyers in public interest and public service from participating in professional organizations); Leigh McMullan Abramson, *Making One of the Most Brutal Jobs a Little Less Brutal*, THE ATLANTIC, Sept. 10, 2015 (heavy workloads in large firms mean a lack of time for other activities).

368. Southworth, *supra* note 365, at 436 (only twenty-seven percent of lawyers currently are members of the ABA). Low membership in the ABA is not a new issue. When the organization was formed, it was designed to serve elite attorneys, and only about eighteen percent of all lawyers had joined by 1930. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 8. Today, however, membership shortfalls threaten the ABA's bottom line. The Treasurer's Report for the fiscal year ending August 31, 2015 found decreases in membership dues that were not offset by efforts to expand revenue from other sources. *ABA Treasurer's Report*, A.B.A. J. 21 (May 2016).

369. See, e.g., STEPHEN DANIELS AND JOANNA MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE 72, 87-95 (2015) (need for and formation of special organizations to serve plaintiffs' attorneys in Texas).

370. Scheingold, *The Struggle to Politicize Legal Practice*, *supra* note 367, at 139-41.

371. See, e.g., National District Attorneys Association, [www.ndaajustice.org](http://www.ndaajustice.org); National Association for Public Defense, [www.publicdefenders.us](http://www.publicdefenders.us); National Legal Aid & Defender Association, [www.nlada.org](http://www.nlada.org).

372. See, e.g., National Bar Association, <https://www.nationalbar.org>; Hispanic National Bar Association, [hnba.com](http://hnba.com); National Asian Pacific American Bar Association, [www.napaba.org](http://www.napaba.org); National Association of Women Lawyers, [www.nawl.org](http://www.nawl.org); see generally Scheingold & Bloom, *supra* note 273, at 242 (growing fragmentation of progressive lawyers due to the rise of bar associations focused on women and minorities). Sociologist Steven Brint has argued that the values that professionals express have grown less cohesive with increased demographic diversity and the proliferation of public and non-profit as well as for-profit practice settings. BRINT, *supra* note 10, at 95-103.

373. There have been challenges to the very concept of a unified bar with mandatory membership for all lawyers practicing in a state. See Dan Kittay, *Unified Bar Update: Recent*

Moreover, new ways of dispersing knowledge have left attorneys vulnerable to the perils of commoditization. Lay people today can locate legal information, including cases, statutes, regulations, and legal forms, that once might have seemed beyond their reach.<sup>374</sup> Growing dispersion of knowledge has led to increased interest in licensing non-lawyers and relying on software algorithms to perform routine legal tasks.<sup>375</sup> As these technologies become more sophisticated, legal disputes increasingly can be resolved in virtual settings that displace the traditional forums that lawyers once monopolized.<sup>376</sup> Dramatically expanded access to information and the rise of non-lawyer lawyering make claims of professionalism based on exclusive access to expertise increasingly difficult to sustain.<sup>377</sup>

Forces of stratification and fragmentation also are at work in legal education. Emphasizing the commodification of expertise, scholars today debate whether a law degree is a good investment based on present costs and projected lifetime earnings.<sup>378</sup> With the focus on a degree's financial yield, students have come to conclude that getting a lucrative law firm job is the sine qua non of legal education. Those at top schools reap the rewards of BigLaw, while others struggle to pay off their debts.<sup>379</sup> In this "winner takes all" environment, there is little, if any,

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*Challenges, Including 'Teeth Whitening' and Legal Zoom Cases*, 39 BAR LEADER (July/Aug. 2015), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2014-15/july-august/unified-bar-update-recent-challenges-including-teeth-whitening-legalzoom-cases.html](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2014-15/july-august/unified-bar-update-recent-challenges-including-teeth-whitening-legalzoom-cases.html). As the concept of a unified bar has come under attack, a 2015 United States Supreme Court decision prompted new concerns by holding that a state dental board's efforts to exclude non-dentists from the market for teeth whitening constituted an unreasonable restraint of trade. *N. C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015). Shortly thereafter, LegalZoom filed suit in North Carolina to establish that the state bar could not prohibit it from offering prepaid legal services plans. *Complaint for Damages and Injunctive Relief at 3-7, LegalZoom.com, Inc. v. North Carolina State Bar*, No. 1:15-CV-439 (D.N.C. June 3, 2015).

374. BARTON, *supra* note 29, at 88-97; RICHARD SUSSKIND, *TOMORROW'S LAWYERS* 43-44 (2013); RICHARD SUSSKIND, *THE END OF LAWYERS?*, 121-30 (2010).

375. BARTON, *supra* note 29, at 235; SUSSKIND, *TOMORROW'S LAWYERS*, *supra* note 374, at 49; Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2630-33 (2014). So far, efforts to regulate these practices based on restrictions on the unauthorized practice of law have met with limited success. Deborah L. Rhode, *White Paper: What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 435-36 (2016) (describing setbacks for bar association challenges at the state and federal level).

376. SUSSKIND, *TOMORROW'S LAWYERS*, *supra* note 374, at 99-102; SUSSKIND, *THE END OF LAWYERS?*, *supra* note 374, at 17-24.

377. See Ellen M. Harshman et al., *Professional Ethics in a Virtual World: The Impact of the Internet on Traditional Notions of Professionalism*, 58 J. BUS. ETHICS 227, 229-32 (2005).

378. See, e.g., Michael J. Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 259, 272-76, 280, 284-85 (2014); Steven Davidoff Solomon, *Debating Yet Again, the Worth of Law School*, N.Y. TIMES (July 18, 2013, 11:44 AM), <https://dealbook.nytimes.com/2013/07/18/debating-yet-again-the-worth-of-law-school/>.

379. TAMANAHA, *supra* note 29, at 140-43.

room for students to contemplate public-regarding obligations.<sup>380</sup> Much as in law practice, dedication to the greater good is treated not as a professional duty but as a personal preference, which students must self-finance by acquiring large amounts of student debt.<sup>381</sup>

The profound question facing today's lawyers and legal educators is whether these patterns of intensifying fragmentation and stratification within the profession will augur a fourth age of modern American lawyering. If so, this age will stand in marked contrast to its predecessors. The three prior ages of American lawyering were marked by relentless growth as new forms of practice emerged in response to dynamic social conditions. Today, however, the focus is on how law practice will shrink and who will be left behind.<sup>382</sup> In earlier ages, attorneys themselves were the primary drivers of innovations in corporate, government, and cause lawyering, but today, many of the pressures for change come from without. Lawyers no longer seem to be fully in control of their destinies as technology companies offer services that threaten private practice and politicians push for deregulation that limits the need for government practice.<sup>383</sup> Now, when firms like Dentons, DLA Piper, and Latham and Watkins invest in an artificial intelligence platform to bring down legal costs, it is not clear whether this is a reactive or proactive move.<sup>384</sup> These firms may be mobilizing because they fear that others are already developing similar technologies

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380. Garth, *supra* note 29, at 529-30. Recent empirical evidence suggests that legal education promotes a shift from intrinsic motivation to extrinsic rewards, contributing to heightened levels of dissatisfaction in both law school and law practice. Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 566-69, 623-25 (2015).

381. See Erica Field, Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School 2-3, 5, 7-9, 15-17 (Dec. 2007), [https://scholar.harvard.edu/files/field/files/field\\_nyu\\_13108-1.pdf?m=1360040259](https://scholar.harvard.edu/files/field/files/field_nyu_13108-1.pdf?m=1360040259) (describing different levels of commitment to public interest careers between students who received fee waivers and students who received equivalent loan forgiveness). Though loan forgiveness programs mitigate the financial burden, graduates run the risk that terms will be modified or plans eliminated before they can take advantage of them. Public Service Loan Forgiveness: Questions and Answers for Federal Student Loan Borrowers, FED. STUDENT AID, <https://studentaid.ed.gov/sa/sites/default/files/public-service-loan-forgiveness-common-questions.pdf>; Shannon Najmabadi, *A Year Before Public-Service Loan Forgiveness Kicks In, Uncertainty Looms*, CHRON. HIGHER EDUC., Nov. 18, 2016.

382. BARTON, *supra* note 29, at 51-54.

383. *Id.* at 85-86, 120.

384. Debra Cassens Weiss, *DLA Piper to Use Artificial Intelligence for M & A Document Review*, A.B.A. J. (June 15, 2016), [http://www.abajournal.com/news/article/dla\\_piper\\_to\\_use\\_artificial\\_intelligence\\_technology\\_for\\_ma\\_document\\_review](http://www.abajournal.com/news/article/dla_piper_to_use_artificial_intelligence_technology_for_ma_document_review); Debra Cassens Weiss, *Will Newbie Associates Be Replaced by Watson? 35% of Law Firm Leaders Can Envision It*, A.B.A. J. (Oct. 26, 2015), [http://www.abajournal.com/news/article/will\\_associates\\_be\\_replaced\\_by\\_watson\\_computing\\_35\\_percent\\_of\\_law\\_firm\\_lead/](http://www.abajournal.com/news/article/will_associates_be_replaced_by_watson_computing_35_percent_of_law_firm_lead/).

or they could be seeking to chart their own futures. Or, it could be a little of both.

*B. The Future of Professionalism in an Uncertain World*

With all of these strains on the legal profession, the rhetoric of crisis has become commonplace, though as some have noted, the term “crisis” has been overused in discussing the future of law and lawyers.<sup>385</sup> Even so, two major challenges to traditional notions of professionalism have been born of this sense of crisis. One is a call to ballast professionalism altogether. Law professor Thomas D. Morgan has concluded that the “use of the idea of a ‘profession’ to understand the world of lawyers obstructs clear thinking about what lawyers actually do and how they are likely to have to respond to the world they face.”<sup>386</sup> In his view, social trusteeship is irrelevant because praiseworthy moral conduct should be attributed not to professional identity but to personal character.<sup>387</sup> As for expert professionalism, Morgan acknowledges that lawyers possess valuable knowledge and skills, but he concludes that this merely makes them “economic actors, specially trained, but driven by all of the vices—and virtues—of a capitalist economic system.”<sup>388</sup> As a result, he finds that neither public obligation nor technical expertise justifies professional status.

Legal scholar Russell Pearce reaches conclusions similar to Morgan’s. Because traditional concepts of professionalism cannot be reconciled with the idea that law is a business, Pearce searches for a Middle Range approach that “would permit the community of legal service providers to develop a moral aspiration for their work consistent with the commercial context of law practice and free of the perceived hypocrisy of the Professionalism Paradigm.”<sup>389</sup> Under his approach, the organized bar would continue to certify lawyers’ credentials, but this would not lead to an exclusive license to provide legal services.<sup>390</sup> With both lawyers and non-lawyers permitted to deliver legal advice, Pearce believes that there would be more vigorous efforts to protect consumers

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385. Abel, *You Never Want a Serious Crisis to Go to Waste*, *supra* note 29, at 3-4, 5, 16; Garth, *supra* note 29, at 504-09.

386. MORGAN, *supra* note 30, at 20 (footnote omitted). *See also* Russell G. Pearce, *Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1269-76 (1995) (a “Middle Range approach” that combines an acknowledgment of the market-based nature of law practice with an aspirational, communitarian vision would be superior to the current “Professionalism Paradigm”).

387. MORGAN, *supra* note 30, at 22, 69.

388. *Id.* at 25.

389. Pearce, *supra* note 30, at 1270.

390. *Id.* at 1269.

than is currently the case.<sup>391</sup> In addition, competition from non-lawyers could enhance the quality of legal services for low- and middle-income persons.<sup>392</sup> Finally, by overcoming the cynicism generated by contradictory notions of professionalism, Pearce contends that legal service providers would be free to have a meaningful dialogue about developing a community ethic of service.<sup>393</sup> Like Morgan, Pearce hopes that upending archaic conventions will “provide[] the legal community with the opportunity to turn from lamenting the decline of professionalism to the more important work of improving the delivery of legal services and promoting justice.”<sup>394</sup>

Still other scholars call for the legal profession to dispense with its unified image and openly recognize its deeply divided nature. These proposals are not of a piece, and their differences reveal the fault lines of professionalism in intriguing ways. One type of proposal emphasizes the distinction between expert professionalism and social trustee professionalism and proposes an amicable divorce. After questioning the bar’s commitment to “a single profession of law,”<sup>395</sup> legal scholar Gillian K. Hadfield explicitly rejects the idea that all attorneys should be dedicated to protecting and upholding the foundations of American democracy.<sup>396</sup> In her view, the legal system serves two very different functions: the safeguarding of political and democratic institutions on the one hand and the promotion of efficient market transactions on the other.<sup>397</sup> These functions should be disaggregated so that differentiated legal professions can evolve.<sup>398</sup> In particular, she argues that the public-regarding aspects of law unduly interfere with efficient operation of the private market.<sup>399</sup> Hadfield proposes that “[t]he financial interests of lawyers should be reined in where access to legal services is necessary to protect democratic interests rooted in our normative goals of equality, dignity, fairness, and individual wellbeing. . . .”<sup>400</sup> However, “where the interests at stake are the profit-making endeavors of entities, our primary concern in the design of regulation should be the efficiency of legal

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391. *Id.* at 1270.

392. *Id.* at 1272-74.

393. *Id.* at 1274-75.

394. *Id.* at 1276.

395. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1692 (2008). This commitment is set forth in ABA Center for Professional Responsibility, Resolution of House of Delegates Adopting Revised Recommendation 10F (2000), <http://www.abanet.org/cpr/mdp/mdprecom10f.html>.

396. Hadfield, *supra* note 395, at 1705-06.

397. *Id.* at 1702.

398. *Id.* at 1704-05.

399. *Id.*

400. *Id.* at 1730.

markets and their capacity to promote the efficiency of other markets.”<sup>401</sup> In Hadfield’s bifurcated account of law practice, expert professionalism dominates the market, while public values at the heart of social trusteeship become part of an amorphous catchall of norms beyond the scope of efficient exchange.<sup>402</sup>

Hadfield’s proposal speaks directly to Kronman and MacCrate’s anxieties about the perils to social trusteeship that market restructuring poses, and it seems likely to bring little comfort to those who see public-regarding obligations as inhering in legal professionalism, regardless of practice sector. Her notion of bifurcation stands in marked contrast to that of law professor Brian Tamanaha. He too has questioned the unified nature of the bar, this time by assailing the homogeneity of legal education—enforced through the accreditation process and entrenched by law school rankings.<sup>403</sup> Much as Alfred Z. Reed proposed to differentiate among law schools,<sup>404</sup> Tamanaha has recommended creation of a two-track system with elite institutions offering traditional academic programs of instruction while other law schools provide affordable, practice-oriented training.<sup>405</sup> He argues that “[t]he legal profession has never been unitary in the nature of the work done by lawyers or in their compensation.”<sup>406</sup> So, “[a] law graduate who wishes to engage in a local practice need not acquire, or pay for, the same education as a graduate aiming for corporate legal practice.”<sup>407</sup> Tamanaha believes that lower-cost degrees could promote access to the profession among the middle class and poor, and restructuring legal education could enhance opportunities to serve clients who currently lack access to legal services.<sup>408</sup>

In a 2014 report, the ABA Task Force on the Future of Legal Education recognizes the same divide as Tamanaha does. The Task Force acknowledges that “[i]t matters greatly whether . . . one takes a view of lawyers as primarily deliverers of technical services requiring a certain skill or expertise, or as persons who are broad-based problem

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401. *Id.* Elsewhere, Hadfield describes how we should facilitate efficient legal markets through various forms of competition. See GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD* 219-45 (2017).

402. Hadfield, *supra* note 395, at 1730.

403. TAMANAHA, *supra* note 29, at 174.

404. See *supra* notes 99-105 and accompanying text.

405. See TAMANAHA, *supra* note 29, at 174.

406. *Id.* at 27.

407. *Id.* at 174. Like Reed, Tamanaha acknowledges that different programs of instruction are likely to track class privilege, but he believes that elite law schools already attract a disproportionately wealthy student body. *Id.* at 102.

408. *Id.* at 27, 175.

solvers and societal leaders.”<sup>409</sup> The Task Force equates “[t]he traditional emphasis on legal education as delivering public value” with “a focus on quality of legal education as an overriding goal by law schools.”<sup>410</sup> By contrast, “the new emphasis on consumer considerations—and more broadly on legal education as a private good—has had the opposite tendency,” with a push to drive down prices.<sup>411</sup> Though purporting to strike a middle ground, the Commission emphatically concludes that “*law schools are in the business of delivering legal education services.*”<sup>412</sup> Unsurprisingly, with this commercial orientation, the report focuses almost entirely on inculcating technical competencies in the most cost-effective way.<sup>413</sup>

A natural outgrowth of the proposal to offer two-tiered law degrees is the push to certify the legal competencies of non-lawyers.<sup>414</sup> According to a 2013 Hanover Research report, approximately twenty law schools had degrees of this kind,<sup>415</sup> and the programs now are common enough to merit a list on the ABA Section of Legal Education’s website.<sup>416</sup> Some commentators have expressed doubts about the value of the credentials, which remain largely unregulated and untested commodities.<sup>417</sup> As skeptic Kyle McEntee, Executive Director of Law School Transparency, observes, non-J.D. programs may simply be

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409. ABA Task Force on the Future of Legal Education, Report and Recommendations 14 (Jan. 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).

410. *Id.* at 25.

411. *Id.*

412. *Id.* (emphasis in original).

413. *Id.* at 22-23, 25.

414. ABA Task Force on the Future of Legal Education, *supra* note 409, at 24-25; Jennifer Smith and Ashby Jones, *More Often Non-Lawyers Try a Taste of Law School*, WALL ST. J., May 20, 2013; Avi Wolfman-Arent, *New Paper Chase: Law School for Non-Lawyers*, MARKETPLACE (Aug. 15, 2016, 3:48 PM), <http://www.marketplace.org/2016/07/15/education/law-schools-offering-programs-non-lawyers>; Karen Sloan, *Northwestern’s New Masters Program Targets Non-Lawyers*, NAT’L L.J. (Nov. 14, 2013).

415. Hanover Research, *Alternative Non-JD Programming for Law Schools 27-29* (June 2013), <http://hanoverresearch.com/media/Alternative-Non-JD-Programming-for-Law-Schools1.pdf>.

416. ABA Section of Legal Education and Admissions to the Bar, Resources-Post J.D. and Non-J.D. Programs, [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d.html). There have been similar developments in other areas of professional education. *See generally* Susan Bedner et al., *Educational Preparation of Nurse Practitioners and Physician Assistants: An Exploratory Review*, 29 ADVANCED EMERGENCY NURSING J. 158, 165-67 (2007). Some have questioned the utility and efficiency of costly licensing requirements for non-physician clinicians. Shirley Svorney, *Medical Licensing: An Obstacle to Affordable, Quality Care*, MED. BENEFITS, Sept. 17, 2008, at 6-7.

417. Wolfman-Arent, *supra* note 414; Smith and Jones, *supra* note 414; Sloan, *supra* note 414; Eli Mystal, *Law Schools Target New Students to Fleece, Above the Law* (May 20, 2013, 2:27 PM), <http://abovethelaw.com/2013/05/law-schools-target-new-students-to-fleece/>.

offered “as a cash grab—not because people actually need them.”<sup>418</sup> Whatever the actual value, these degrees are a concession to the declining professional monopoly on legal expertise.

The notion of bifurcation in the legal academy is strikingly different from Hadfield’s account of the split in the legal profession. Creating two tracks of law schools reconstructs expert professionalism by establishing tiers of mastery that have little or nothing to do with social trusteeship. In the three prior ages of modern American lawyering, the most intense contests focused on the scope of lawyers’ public obligations—whether to protect the integrity of the legal process, to serve the public in government positions, or to challenge societal injustice through litigation and other forms of advocacy. Each innovation in lawyering expanded the landscape of practice, creating new ways for lawyers to apply their expertise but also new ways to serve the public at large. In an era of contraction, Tamanaha’s proposal alerts us that a fourth age of modern American lawyering may openly contest the previously uncontroversial notion of expert professionalism as a unifying feature of lawyers’ identity. No longer will it be possible to assume that a shared level of expertise is a *sine qua non* for the delivery of legal services. As a result, expert professionalism itself will be destabilized, further complicating debates about how public-regarding obligations grow out of the privileges that come with the technical mastery of law.

*C. The Way Forward: Deepening Our Understanding of the Symbiotic Relationship Between Social Trustee and Expert Professionalism*

To address claims that the current crisis will undo conventional notions of professionalism, lawyers and legal educators must remember to look not only at Kronman’s and MacCrate’s concerns that social trusteeship will be displaced by market forces but also the real possibility that expertise will be unbundled in ways that are themselves de-professionalizing. In considering whether these dangers are imminent, the practicing bar and legal educators should work together to identify the changing parameters of expert professionalism as well as the pressures on social trustee professionalism. A more nuanced understanding of lawyers’ everyday lives can illuminate the complex and symbiotic ways in which social trustee and expert professionalism contribute to workplace identities. That deepened appreciation in turn can offer insights into the resiliency of professionalism as practice environments are transformed.

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418. Wolfman-Arent, *supra* note 414.



With respect to expert professionalism, the organized bar should partner with law professors and empirical scholars to evaluate which skills have been critical to lawyers' success, which new skills may be emerging that affect success, and which skills are most likely to be commoditized and hence become less relevant to success. Professors Marjorie M. Shultz and Sheldon Zedeck have done important work that bears on these questions.<sup>419</sup> Their research draws on interviews with alumni of Berkeley Law School, clients, faculty, students, and judges as well as focus groups and an online survey of alumni to assess factors important to lawyer effectiveness.<sup>420</sup> Interestingly, Shultz and Zedeck have identified a number of relevant factors that are independent of conventional measures of cognitive ability, such as grade point averages and Law School Admission Test (LSAT) scores.<sup>421</sup> These factors relate to personality traits like optimism, ambition, and stress management, interpersonal sensitivity, and the capacity for situated judgment.<sup>422</sup> According to Shultz and Zedeck, these non-cognitive factors often prove to be more highly correlated with lawyer performance than academic measures.<sup>423</sup> A later study by Educating Tomorrow's Lawyers has confirmed these findings.<sup>424</sup> Drawing on a nation-wide survey of over 24,000 attorneys who work in a wide range of settings, Alli Gerkman and Logan Cornett report that along with intellectual aptitude and legal skills, young lawyers must display emotional intelligence, an ability to communicate effectively, as well as character traits that demonstrate honesty, integrity, and reliability.<sup>425</sup> Gerkman and Cornett conclude that:

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419. Marjorie M. Shultz and Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011).

420. *Id.* at 629-31.

421. *Id.* at 643-47.

422. *Id.* at 643-47.

423. *Id.* at 654. Based on interviews and surveys of associates at large law firms, Lori Berman, Heather Bock, and Juliet Aiken also found that non-cognitive factors played an important role in their sense of flourishing and their success in making partner. LORI BERMAN, HEATHER BOCK, & JULIET AIKEN, ACCELERATING LAWYER SUCCESS 98-99 (2016); see also Lori Berman & Heather Bock, *Developing Attorneys for the Future: What Can We Learn from the Fast Trackers?*, 52 SANTA CLARA L. REV. 875, 895-96 (2012).

424. Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 5 (July 2016).

425. *Id.* at 5, 8, 9, 15. A National Conference of Bar Examiners survey of lawyers in practice for three years also found that many of these same abilities were important. Susan Case, *Summary of the National Council of Bar Examiners Job Analysis Survey Results*, National Council of Bar Examiners (Jan. 2013). A study of Minnesota law firm attorneys found the same thing. Neil W. Hamilton, *Law Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 15-18 (2013).

Intelligence, on its own, is not enough. Technical legal skills are not enough. [Attorneys] require a broader set of characteristics (or, the character quotient), professional competencies, *and* legal skills that, when taken together, produce a whole lawyer. When we value any one foundation, like intelligence, and when we value any one group of foundations, like legal skills, we shortchange not only the potential of that lawyer—we also shortchange the clients who rely on them.<sup>426</sup>

According to this research, accounts of expert professionalism that focus narrowly on substantive knowledge and technical skills significantly understate the complexity of what it takes to be an effective lawyer.<sup>427</sup> Non-cognitive factors enable lawyers to better assess the contexts in which legal problems arise and to make superior situated judgments for their clients. These abilities transcend any particular transaction. For example, the capacity to cultivate relationships with colleagues and clients along with the ability to develop strategic plans for large-scale undertakings can be critical to preserving a law firm's health. Partners can recognize and reward these talents, for example, by using firm citizenship as well as origination of new business and number of billable hours to set compensation.<sup>428</sup>

As for emerging skills that are increasingly relevant to success, some preliminary research bears on this question. In a study of large law firm partners done after the 2008 recession, researchers Milton Regan and Lisa Rohrer found that entrepreneurial skills have grown in significance in determining partner compensation, mobility, and job security.<sup>429</sup> As one partner explains, "You need to be a good technical lawyer, but that is sort of table stakes not to get fired."<sup>430</sup> With respect to bringing in new clients, lawyers must be able to make themselves known through networking, make successful pitches for business, and maintain relationships.<sup>431</sup> But just as importantly, for the majority of attorneys who cannot expect to be rainmakers, there is a need for internal marketing to ensure that other partners refer matters to them.<sup>432</sup> As one lawyer explained, this means "getting to know partners, trying to get opportunities to work with them, and getting your name around to partners in other offices."<sup>433</sup> Even if self-promotion has always figured

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426. Gerkman & Cornett, *supra* note 424, at 38.

427. *Id.* at 3; Shultz & Zedeck, *supra* note 419, at 654.

428. REGAN & ROHRER, *supra* note 359, at 47.

429. *See id.*

430. *Id.* at 29.

431. *Id.* at 31.

432. *Id.*

433. *Id.* at 33.

in growing a law practice, the economic downturn in 2008 intensified these pressures, leading one partner to muse that:

What I didn't realize was how much of a business the practice of law is. I spend a very significant part of my time just managing the practice and managing my relationship with the law firm and managing my relationship with my clients. And I spend a very significant portion of my time worrying about business development . . . . I am my own sales force. I am my own marketing force. I also have to service all my clients at the same time and I am effectively my own billing department . . . . So you find yourself a small business within a law firm, and I had no idea that I would be running, literally running, a small business in a law firm.<sup>434</sup>

What the Regan and Rohrer study suggests, then, is that the rigors of the market are forcing attorneys to hone their entrepreneurial skills, but these capacities supplement rather than supplant the traditional ones that have made for a successful lawyer.

As for which skills are apt to be more or less durable in the face of commoditization, Richard Susskind's work offers some guideposts.<sup>435</sup> He describes how bespoke work that is "traditional, hand-crafted, one-to-one consultative professional service, highly tailored for the specific needs of particular clients" becomes commoditized.<sup>436</sup> When legal tasks are done on a recurring basis, bespoke work grows increasingly standardized. This routinization takes place, even if the service is still "delivered in a highly personalized manner, with regular, direct contact between the lawyer and the client."<sup>437</sup> Once standardization occurs, the legal service can be systematized through automation; initially, these technologies will be for internal use only.<sup>438</sup> Later, this internal system is made directly accessible to clients through packaging of the legal services, thus permitting non-lawyers to learn about pressing legal concerns.<sup>439</sup> The final stage in this evolutionary process occurs with commoditization, when packages of legal services are "very readily available in the market, often from a variety of sources, and certainly at highly competitive prices."<sup>440</sup>

As Susskind notes, lawyers fear that legal practice will be less prestigious and less remunerative if "high quality service, charged at a reasonable price and subject to regular update and maintenance, can be

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434. *Id.* at 35-36.

435. SUSSKIND, *THE END OF LAWYERS*, *supra* note 374.

436. *Id.* at 29.

437. *Id.* at 30.

438. *Id.*

439. *Id.* at 31.

440. *Id.*

delivered in standardized, systematized, and packaged form.”<sup>441</sup> These anxieties clearly figure in concerns that there is a crisis in the legal profession and legal education. Yet, examples of commoditization mainly focus on how certain fields of knowledge cease to be novel and become mundane. There is no discussion of practice conditions that generate innovation and replenish the realm of bespoke practice even as commoditization is occurring in other areas. For example, innovation may turn on collaboration that enables lawyers to think outside the box about their practices. While the process of nurturing creativity undoubtedly implicates cognitive capacities, it also may depend on non-cognitive talents that enhance collegial exchange and deepen client relationships. Skills related to communication and facilitation can enable lawyers to appreciate how practice contexts are changing and to convene the teams that will address those changes effectively. Then, entrepreneurial abilities can help to alert clients to the next big thing in bespoke practice. This broader understanding of professional expertise affords some comfort in the face of commoditization. By moving beyond a focus on technical knowledge, lawyers can consider how to develop practices that identify and capitalize on emerging opportunities as the market for legal services shifts.

Similar efforts are needed to address fears that intensifying pressures to focus on the bottom line will eclipse social trusteeship. Most of these concerns relate to the profit motive crowding out a sense of public obligation at large law firms.<sup>442</sup> Returning to the Regan and Rohrer study, their interviews reveal that partners at major firms are struggling to reconcile market forces with professional values.<sup>443</sup> Law firm culture—especially as expressed through the compensation process—expresses these dual commitments. While some firms may have an “eat what you kill” model that treats law like a business, most firms encourage a more balanced approach by recognizing contributions to the wellbeing of the firm as well to the good of society. For example, compensation committees recognize cooperative behavior as a way to signal that collegiality is a core value at the firm.<sup>444</sup> In addition, committees count pro bono work as a contribution to the firm’s collective commitments.<sup>445</sup> Through these compensation decisions, firms acknowledge that “many lawyers value the opportunity to be of

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441. SUSSKIND, *THE END OF LAWYERS*, *supra* note 374, at 32.

442. See, e.g., Marc Galanter and William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1906-07 (2008).

443. REGAN & ROHRER, *supra* note 359, at 91. Deborah Rhode’s work reveals similar concerns among young lawyers who enter law practice. RHODE, *supra* note 361, at 55.

444. REGAN & ROHRER, *supra* note 359, at 38-43.

445. *Id.* at 47.

service to clients, to work in a collegial atmosphere, to do high-quality work, to participate in work that is intrinsically meaningful, and to be of some service to society.”<sup>446</sup> As Regan and Rohrer conclude, “[n]ot all firms will necessarily attempt to give meaningful weight to professional values. Furthermore, even those that do will not necessarily succeed in striking a credible balance. Our research suggests, however, that it matters to many partners that their firms make the effort to do so.”<sup>447</sup>

Regan and Rohrer’s study suggests that partners are not yet ready to ballast professionalism and enter a fourth age of modern American lawyering. But to fully answer questions about the future of the legal profession and legal education, additional work is needed. A high proportion of the research done so far has focused on the large law firm. Although major firms are important opinion leaders in the profession, it is critical to consider the portfolio of skills that make for effective lawyers in other practice settings, including solo and small law firms, in-house counsel departments, government agencies, and public interest organizations. Without a broader inquiry, lawyers and legal educators can only speculate about how notions of expert professionalism are changing outside the corporate law firm.

For similar reasons, there should be additional study of how lawyers in government and public interest define social trusteeship. As law professor Ann Southworth has noted, “[w]orkplaces and practice specialties play an important role in ‘lawyer socialization’ and the ‘day-to-day interpretation of professional standards.’”<sup>448</sup> Moreover, the professional ideals generated in different practice settings vary based on “lawyers’ economic, power, and status goals.”<sup>449</sup> An unduly narrow focus on large law firms or an unduly broad emphasis on the profession as a whole can obscure the “ethical pluralism” that informs the meaning of social trusteeship in a range of practice environments.<sup>450</sup> An acknowledgment of these diverse commitments could reveal the limits of a polarized, binary rhetoric that pits market forces against public obligation. In fact, one source of social trusteeship’s ongoing influence may be its capacity for adaptation to new practice settings. As the field of law changes, trusteeship can evolve to take account of new ways to serve the greater good while accommodating the unique features of distinct sectors of the profession. In a field traditionally united by common technical competencies, expertise serves as an important source of shared professional identity. Yet, the capacity for differentiation in a

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446. *Id.* at 60.

447. *Id.* at 91.

448. Southworth, *supra* note 365, at 439.

449. *Id.* at 441.

450. *See id.* at 441-42 (describing the phenomenon of ethical pluralism).

range of practice environments may be a critical source of resilience and relevancy for social trusteeship.

To undertake inquiries like these, it will be important for leaders in the bar and legal education to join forces. In this spirit, Ben W. Heineman, Jr., William F. Lee, and David B. Wilkins have made the case for elite law schools, large law firms, and in-house counsel at major corporations to work cooperatively in thinking about lawyers' professional identity.<sup>451</sup> Although most people identify lawyers as technical experts, Heineman, Lee, and Wilkins contend that attorneys also have to be wise counselors who consider not only what the law is but what it might become.<sup>452</sup> These counselors should evaluate both the course of action that is legally permitted and the one that is right in light of a particular client's goals. To serve as a wise counselor, lawyers must have the capacity for situated judgment, the ability to facilitate exchange among multiple stakeholders, and the skill to seek out and listen to non-lawyers with unique insights into a client's aims and culture.<sup>453</sup> In addition, many lawyers will assume positions of leadership, and in these roles, they also will need to be able to make decisions, manage organizations and situations, and hew to ethical precepts.<sup>454</sup>

Although Heineman, Lee, and Wilkins emphasize elite sectors of practice, all law schools can partner with attorneys in different practice sectors to consider the skills needed for successful law practice. By undertaking such efforts, legal educators will be heeding the call of the Carnegie report on "Educating Lawyers," which urged law schools to address three apprenticeships: the first emphasizing legal analysis or thinking like a lawyer; the second addressing the practical skills of lawyering; and the third dealing with the role of the lawyer in the larger society.<sup>455</sup> The Carnegie report concludes that schools do an excellent job with the first apprenticeship, which enables students to master the doctrinal intricacies of the law.<sup>456</sup> And, law schools are doing a better job at preparing students for the practice of law through expanded experiential learning courses.<sup>457</sup> Yet, schools continue to lag in addressing the third apprenticeship. In particular, they fail to afford students enough "opportunities to learn about, reflect on, and practice the responsibilities of legal professionals. Despite progress in making

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451. BEN W. HEINEMAN, JR., WILLIAM F. LEE, & DAVID B. WILKINS, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* (2014).

452. *See id.*

453. *Id.* at 9-10.

454. *Id.* at 10-11.

455. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS* 13-14 (2007).

456. *See id.* at 186.

457. *Id.* at 189-90.

legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and to the varied forms of legal practice.”<sup>458</sup> Pursuing inquiries into the changing nature of the skills needed for successful practice could enable schools to refine their experiential learning programs and to explore social trusteeship in different practice settings. This work should enable law school faculty, alumni, and students alike to reflect on their unique professional obligations as lawyers. Students in particular could participate in the research as a way to promote a deeper understanding of expert and social trustee professionalism as they prepare to lead the field of law into its uncertain but dynamic future.

#### CONCLUSION

It is too early to conclude that a crisis in the legal profession and legal education is redefining modern American lawyering as we know it. But efforts to refine our understanding of the knowledge, skills, and social responsibilities that define successful law practice are long overdue. Too often, today’s accounts of lawyering create a sharp dichotomy between “law as a business” and “law as a profession,” pitting expert and social trustee professionalism against one another. In fact, available research offers a far more nuanced picture in which both forms of professionalism figure in attorneys’ sense of their status and satisfaction. Rather than dispense altogether with the language of professionalism, we must interrogate the concept more carefully. Only in that way can we navigate challenging times with a compass that is true to our past and open to our future.

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458. *Id.* at 188.